No. 95-1649-CSY Title: Kansas, Petitioner
v.
Leroy Hendricks

Docketed: April 12, 1996 Court: Supreme Court of Kansas

Vide:
95-9075

Entry	Date	Proceedings and Orders
	Apr 12 1996	Petition for writ of certiorari filed. (Response due May 12, 1996)
	Apr 12 1996	Application (A95-843) continue stay of mandate of Supreme Court of Kansas pending action on petition for a writ of certiorati, submitted to Justice Breyer.
	Apr 17 1996	Response to application (A95-843) filed by Leroy Hendricks.
	Apr 17 1996	Application (A95-843) referred to the Court by Justice Breyer.
	Apr 22 1996	Application (A95-843) granted by the Court. The application for stay presented to Justice Breyer and by him referred to the Court is granted and it is ordered that the mandate of the Supreme Court of Kansas, case No. 73,039, is stayed pending this Court's action on the petition for a writ of certiorari. Should the petition for a writ of certiorari be granted, this order is to continue in effect pending the issuance of the mandate of this Court. If the petition for a writ of certiorari is denied, this order is to terminate automatically.
	May 10 1996	Brief amici curiae of Washington, et al. filed.
	May 13 1996	Brief of respondent Leroy Hendricks in opposition filed.
	May 13 1996	Motion of respondent for leave to proceed in forma pauperis filed.
	May 13 1996	* Affidavit of indigency en route.
	May 22 1996	Affidavit in support of motion to proceed in forma pauperis received from counsel for the respondent.
	May 24 1996	Reply brief of petitioner filed.
	May 29 1996	DISTRIBUTED. June 14, 1996
	Jun 17 1996	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Jun 17 1996	Petition GRANTED. SET FOR ARGUMENT December 10, 1996. **********
	Jul 3 1996	AMICUS CURIAE BRIEFS SHALL BE RECEIVED NO LATER THAN 4:00 P.M., AUGUST 19, 1996.
	Aug 1 1996	Brief of petitioner Kansas filed.
	Aug 1 1996	Joint appendix filed. VIDED.
	Aug 1 1996	Brief of petitioner Leroy Hendricks (Cross-Petitioner) filed. VIDED.
	Aug 14 1996	Brief amicus curiae of Washington State Psychiatric Assn. supporting Hendricks filed.
	Aug 16 1996	Brief amicus curiae of Wisconsin in supporting Kansas filed. VIDED.

No. 95-1649-CSY

Entry	Date	Proceedings and Orders
	Aug 16 1996	Brief amicus curiae of American Psychiatric Assn. supporting Hendricks filed. VIDED.
	Aug 16 1996	Brief amici curiae of Natl. Assn. of Criminal Defense Lawyers, et al. (Hendricks) filed. VIDED.
	Aug 19 1996	Record filed.
	Aug 19 1996	Brief amici curiae of Seattle-King County Defender Association, et al. (Hendricks) filed. VIDED.
	Aug 19 1996	Brief amici curiae of Washington Legal Foundation, et al. supporting petitioner filed.
	Aug 19 1996	Brief amici curiae of Washington, et al. (in support of Kansas) filed.
	Aug 19 1996	Brief amici curiae of Menninger Foundation, et al. (in support of Kansas) filed.
	Aug 19 1996	Brief amicus curiae of Association for the Treatment of Sexual Abusers (for Kansas) filed.
	Aug 19 1996	Brief amicus curiae of National Mental Health Association supporting Hendricks filed.
	Aug 19 1996	Brief amici curiae of American Civil Liberties Union, et al. supporting Hendricks filed.
	Aug 21 1996	LODGING consisting of ten sets of 11 documents received from counsel for amici Seattle-King County Defender Assn., et al.
	Sep 17 1996	Brief of respondent Leroy Hendricks filed. VIDED.
	Oct 9 1996	Reply brief of petitioner Kansas filed.
	Oct 15 1996	Reply brief of cross-petitioner Leroy Hendricks filed. VIDED.
	Oct 29 1996	CIRCULATED.
	Dec 10 1996	ARGUED.

Supreme Court, U.S.
FILED
APR 12 1996

No. 95-1649

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STATE OF KANSAS,
Petitioner,
v.
LEROY HENDRICKS,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Kansas Sexually Violent Predator Act, Kan. Stat. Ann. § 59-29a01 *et seq.*—which provides for the civil commitment and long-term care and treatment of those who are found beyond a reasonable doubt both (1) to be suffering from a mental abnormality that has resulted in the commission of a sexually violent offense and (2) to present a continuing danger to society through a likelihood of repeating such offenses—violate substantive due process principles?

2. What level of constitutional scrutiny applies to a claim that civil confinement of a sexually violent predator for care and treatment deprives him of a liberty interest in violation of substantive due process principles?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-

STATE OF KANSAS,

Petitioner,

v.

LEROY HENDRICKS,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

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PETITION FOR A WRIT OF CERTIORARI

The State of Kansas petitions for a writ of certiorari to review the March 1, 1996, decision of the Kansas Supreme Court holding that the Kansas Sexually Violent Predator Act violates substantive due process principles.

OPINIONS BELOW

The opinion of the Kansas Supreme Court, to be reported at 912 P.2d 129, is included as Appendix A (App. 1a-59a). That Court's March 22, 1996 order granting a temporary 30-day stay of its mandate to permit a request for a stay by this Court is included as Appendix B (App. 60a).[1]

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[1] Petitioner is filing today (ten days before the expiration of the temporary stay) an Application to Stay Mandate addressed to Circuit Justice Breyer.

STATEMENT OF JURISDICTION

This Court's jurisdiction to review the final judgment of the Kansas Supreme Court is invoked pursuant to 28 U.S.C. § 1257(a). The Kansas Supreme Court issued its decision in this case on March 1, 1996, and this petition is filed less than 90 days after that date as required by Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides that

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

The pertinent sections of the Kansas Sexually Violent Predator Act, Kan. Stat. Ann. §§ 59-29a01 through 59-29a11 ("the Act"), are set forth in full in Appendix C (App. 61a-72a), and are quoted extensively in the Statement of the Case.

STATEMENT OF THE CASE

Procedural History

Petitioner, the State of Kansas, filed this action against Respondent, Leroy Hendricks, on August 17, 1994. The State sought to have Hendricks, a repeatedly convicted child molester, civilly committed to a state mental institution for long-term care and treatment under the Kansas Sexually Violent Predator Act, Kan. Stat. Ann. § 59-29a01 *et seq*. The state district court rejected Respondent's constitutional challenges to the Kansas statute, and, following a trial, a jury returned a verdict finding, beyond a reasonable doubt, that Hendricks is a sexually violent predator likely to repeat predatory acts of sexual violence. The district court then ordered Hendricks committed to Larned State Hospital for treatment. On March 1, 1996, the Kansas Supreme Court reversed,

holding by a four-to-three vote that the Kansas statute violates substantive due process principles (App. 1a-59a).

The Kansas Sexually Violent Predator Act

The Act begins with a preamble declaring its purposes and stating the legislative findings upon which it is based:

> The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [existing Kansas involuntary civil commitment statute], which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast . . ., sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure . . . is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities . . ., therefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature.

Kan. Stat. Ann. § 59-29a01. Section 59-29a02 then defines several key terms:

> (a) "Sexually violent predator" means any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the per-

son likely to engage in the predatory acts of sexual violence, if not confined in a secure facility.[2]

(b) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

(c) "Predatory" means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.

. . . .

(e) "Sexually violent offense" means: [one of a list of several Kansas sex crimes including rape, indecent liberties with a child, sodomy, indecent solicitation of a child, sexual exploitation of a child, sexual battery, aggravated versions of the foregoing offenses, conspiracy or attempt to commit such offenses] or

(12) any act which either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this act, has been determined beyond a reasonable doubt to have been sexually motivated.

The Act establishes a number of deadlines and procedures with respect to commitment proceedings, some of which have been altered in respects not material here since the trial court proceedings concerning Respondent Hendricks. The time periods and procedures recited here are those which applied in this case.[3]

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[2] The last seven words in this subsection were added by a 1995 amendment following the trial court proceedings in this case.

[3] The current time periods are shown in Appendix C, which sets out the present amended text of the pertinent sections of the Act and notes other amendments that were made in 1995. None of the 1995 amendments is material to the issues raised by the present Petition.

Sixty days before the anticipated release of any person who may meet the Act's definition of "sexually violent predator," the agency with authority over the person must notify the prosecutor in the county where the person was charged. § 59-29a03.[4] The prosecutor then has 45 days to file a petition alleging that the person is a sexually violent predator, thus invoking the Act's procedures. § 59-29a04.[5] The next step is for the district court to determine whether there is probable cause to believe that the person is a sexually violent predator and, if so, to order the person transferred to an appropriate mental health facility for an evaluation. § 59-29a05.

Within 45 days after the filing of the petition, the district court must conduct a trial to determine whether the person is a sexually violent predator. § 59-29a06. In the trial, the person is entitled to the assistance of counsel and the provision of a mental health professional to evaluate the person. *Id.* If the person makes a jury demand, then the trial is before a jury. *Id.* The trier of fact must determine whether the person is a sexually violent predator beyond a reasonable doubt. § 59-29a07. If the determination is made that the person is, beyond a reasonable doubt, a sexually violent predator, then the person is committed to state custody for "control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." § 59-29a07(a). The Act requires that "[t]he involuntary detention or commitment of persons under this act shall conform to constitutional requirements for care and treatment." § 59-29a09.

Any person committed under the Act must be reevaluated on an annual basis, including district court review

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[4] The amended Act provides that this notification will be given to the Attorney General.

[5] The amended Act adds the additional prerequisites that a "multidisciplinary team" and a "prosecutor's review committee" consider each case.

and a determination whether there is probable cause to believe that it is safe to release the person. § 59-29a08. If the court concludes that there is probable cause to believe that the person may safely be released, then the burden of proof is on the State to demonstrate beyond a reasonable doubt that the person's mental abnormality or personality disorder remains such that it is not safe to release the person. *Id.* The person also may file a petition seeking release at any time, § 59-29a11, or those having custody of the person may determine that the person's condition has so changed that release is appropriate and authorize the person to petition the court for release. § 59-29a10. The procedures and burden of proof in such a proceeding are the same as for a hearing on annual review. *Id.*

The Civil Commitment Proceedings in This Case

The petition in state district court seeking the commitment of Hendricks as a sexually violent predator was filed on August 17, 1994, in anticipation of his imminent release from prison after serving almost ten years of a five to twenty year sentence on the latest of his series of child molestation charges. App. 1a-2a. On August 19, 1994, Hendricks appeared before the district court with counsel and moved to dismiss the petition. App. 2a. The district court reserved ruling on the constitutionality of the Act, concluded that there was probable cause to believe Hendricks was a sexually violent predator, and ordered that Hendricks be evaluated at the Larned State Security Hospital. App. 2a-3a. On the advice of counsel, Hendricks refused to participate in the evaluation, and the district court then issued an order directing him to comply. App. 3a.

Pursuant to the Act, the district court conducted a jury trial on October 3-5, 1994. Hendricks testified that he was sixty years old, and that his history of sexual involvement with children began in 1955 when he exposed his genitals to two young girls. App. 3a; Tr. 204,

209-10.[6] In 1957, he was convicted of lewdness for playing strip poker with a teenage girl, and in 1960 he molested two young boys while working for a carnival. App. 30a; Tr. 211-14. While on parole after three years of imprisonment, he was almost immediately arrested, convicted and imprisoned again for molesting a seven-year-old girl. App. 30a; Tr. 215-17. In 1967, Hendricks was again imprisoned for molesting another young boy and girl. App. 30a; Tr. 223-25. After being released from that period of incarceration, he molested his step-daughter and stepson. App. 30a; Tr. 234-37. Hendricks testified that when he suffers stress, he is unable to control the urge to engage in sexual activity with a child. App. 3a; Tr. 247. Hendricks agreed that he remains a pedophile, and predicted that only his death could guarantee against further sexual predation. App. 3a; Tr. 230, 256, 264.

The chief psychologist at Larned Hospital, Dr. Charles Befort, testified that he had evaluated Hendricks and he believed it likely that Hendricks would engage in predatory acts of sexual violence or sexual activity with children if at liberty to do so. App. 3a; Tr. 357. Dr. Befort testified that, from a psychological perspective, he did not believe that Hendricks was mentally ill or had a personality disorder, but that pedophilia was a "mental abnormality" in his opinion. App. 4a; Tr. 366-67, 383. A forensic psychiatrist, Dr. William Logan, testified on behalf of Hendricks that treatment of sex offenders reduced recidivism only from the 10-40% range to a 3-37.5% range, and that he did not believe psychiatrists and psychologists could predict with any degree of certainty whether a sex offender is likely to engage in sexual predation in the future. App. 4a; Tr. 467, 469.

The jury returned a verdict finding, beyond a reasonable doubt, that Hendricks is, within the meaning of the

[6] "Tr." refers to the transcript of the jury trial, filed in the Kansas Supreme Court.

Act, a sexually violent predator who is likely to repeat his predation if free to do so. App. 4a. The district court then ordered Hendricks committed to the Larned State Security Hospital, where he has remained during the pendency of his appeal.[7]

The Kansas Supreme Court's Decision [8]

The Kansas Supreme Court's divided decision invalidating the Act was based on the proposition that on its face the Act violates substantive due process requirements established by this Court's decision in *Foucha v. Louisiana*, 504 U.S. 71 (1992). In *Foucha*, this Court considered whether the state could continue to detain an insanity acquittee who was no longer mentally ill (having only an antisocial personality) until such time as he could satisfy the burden of proving that he was no longer dangerous. By a 5-4 vote, with four separate opinions, the Court held that substantive due process prohibited Louisiana from continuing to detain Foucha under such terms.

a. ***The opinion of the court***

The "opinion of the court" below was specifically joined by only three members of the seven-member court. Without ever articulating the level of constitutional review it was applying, the opinion held that the Act violates the substantive due process standard of *Foucha* because it permits commitment of persons who suffer from a dangerous "mental abnormality" that, while specifically defined in the Act, does not fall within the definition of

[7] As noted in the stay application being filed herewith, Respondent Hendricks will be released on April 22, 1996 unless a further stay is granted by this Court.

[8] The case was transferred from the Kansas Court of Appeals to the Supreme Court pursuant to state procedure. Since the district court wrote no opinion, the only opinion below is that of the Supreme Court.

"mental illness" in the traditional Kansas civil commitment statute, Kan. Stat. Ann. § 59-2902(h).

The opinion of the court interpreted *Foucha* as establishing a categorical rule of substantive due process that "to indefinitely confine as dangerous one who has a personality disorder or antisocial personality but is not mentally ill is constitutionally impermissible." App. 19a. From this it extrapolated the further proposition that "[s]imilarly, to indefinitely confine as dangerous one who has a mental abnormality is constitutionally impermissible." App. 19a. It found the concept of "mental abnormality" unacceptable because

> The term is not defined in DSM-III-R.[9] It therefore could not be used appropriately in a formal diagnosis. "Mental abnormality" is not a psychiatric or medical term but, rather, a legal term defined in the Act. App. 19a.

In other words, the opinion found a lack of substantive due process because

> It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. The legislature concedes that sexually violent predators are not amenable to treatment under [the traditional statute governing commitment of the mentally ill]. If there is nothing to treat under [that statute], then there is no mental illness. App. 15a.

Recognizing that the Kansas Sexually Violent Predator Act is modeled after a Washington statute enacted

[9] The reference is to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (3d ed. rev. 1987). App. 13a. A subsequent revision is referred to as DSM-IV.

in 1990, the court examined (1) the Washington Supreme Court's decision upholding that State's statute against substantive due process challenge, and (2) a federal district court decision reaching the opposite conclusion and granting habeas relief in that same case. *See* App. 12a-19a, discussing *In re Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993), and *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995).[10] The Kansas Supreme Court specifically rejected the Washington Supreme Court's conclusion that any constitutional "mental illness" requirement was met by the legislative definition of "mental abnormality" in the Act itself. App. 17a.

b. *The opinion of the concurring justice*

The concurring justice, whose vote was decisive, noted that, "[w]ithout violating the Constitution, the State could have incarcerated Hendricks until he exhaled his last breath and his spirit departed this earth, but it did not." App. 22a. He reluctantly agreed with the outcome, however, "[b]ecause the Washington act, which is almost identical and substantially similar legislation to the Kansas act, was declared unconstitutional by the federal court, and the reasoning of the majority follows the prior decisions of the Supreme Court of the United States . . . ."[11] App. 24a.

c. *The dissent*

The dissent, joined by three justices, noted that the view of the Washington Supreme Court was shared by the

[10] An appeal from that decision (9th Cir. No. 95-35958) was argued in the United States Court of Appeals for the Ninth Circuit on March 7, 1996. The district court granted a stay of its order pending the appeal; a copy of its stay order is attached to the stay application being submitted herein today.

[11] The concurring justice underscored his diffidence by noting that "[i]n this instance we may not be the court of last resort. Under the rules of the United States Supreme Court, the State may seek a writ of certiorari, and that Court has the power to make the final determination." App. 24a.

Wisconsin Supreme Court, which had upheld a substantially similar statute in two companion decisions, *State v. Post*, 197 Wis. 2d 279, 541 N.W.2d 115 (1995), and *State v. Carpenter*, 197 Wis. 2d 252, 541 N.W.2d 105 (1995).[12] The dissent concluded that "Kansas should join the decisions of the Supreme Courts of Washington and Wisconsin . . . ." App. 24a (citations omitted).

The dissent pointed out initially that the opinion of the court "fails to address directly what test should be used to measure the constitutionality of a legislative act attacked on the basis of substantive due process." App. 33a. While concluding that strict scrutiny should apply and finding that the Act passes muster under that standard, the dissent observed that "the Supreme Court recently indicated in *Foucha* that our review might be somewhat less than strict scrutiny." App. 36a.

According to the dissent, the fundamental flaw in the opinion for the court was its

> erroneous conclusion that our Act is constitutionally infirm because it requires no showing of mental illness. It seems to base this conclusion on the absence of those two words. Yet it is not the incantation of "mental illness" that has constitutional significance, but the substance of the statute. Nor is mental illness an inflexible standard capable of precise meaning. As noted in *State v. Post*, 197 Wis. 2d at 304, "the Supreme Court has declined to enunciate a single definition that must be used as the mental condition sufficient for involuntary mental commit-

[12] The first of these Wisconsin decisions rejected a substantive due process attack like that in issue here; the second rejected ex post facto and double jeopardy arguments. Petitions for writs of certiorari have been filed by three of the subjects of the two Wisconsin cases, raising only questions concerning ex post facto and double jeopardy. *Schmidt v. Wisconsin*, No. 95-8131 (challenging *State v. Carpenter* on these limited grounds), filed March 6, 1996; *Post and Oldakowski v. Wisconsin*, No. 95-8204, filed March 12, 1996.

ments. The Court has wisely left the job of creating statutory definitions to the legislators who draft state law."

> The question is not whether Hendricks fits some clinical definition of mental illness, but whether he fit a legislative classification that is more than mere idiosyncratic behavior "within a range that is generally acceptable." *Addington* [*v. Texas*], 441 U.S. [418] at 426-27 [1979]. And, whether that definition strikes an appropriate balance between a compelling interest of the State and the liberty interest of the individual—that is, whether it passes strict scrutiny. App. 41a-42a.

Applying strict scrutiny, the dissent found it obvious "that the State of Kansas has a compelling interest both in treating sexually violent predators and in protecting society from their actions." App. 36a. The real question is, therefore, "whether the Act is sufficiently narrowly tailored to serve those interests without unduly burdening individual rights." App. 36a. And that requirement is satisfied because

> The Act is narrowly tailored in a number of particulars. First, it does not apply to sex offenders generally, or even to all sex offenders suffering some ailment of the mind, but applies only to those persons with an ongoing mental condition rendering them likely to commit acts of sexual violence. Second, it does not apply to those susceptible to less restrictive treatment, but only to those who require secure confinement to prevent such violence. Third, to reduce the risk of erroneous detention it does not apply to all persons accused of sexually violent offenses, but only those previously charged or convicted. Fourth, it does not apply in the face of meager or even clear and convincing evidence, but requires the State to prove beyond a reasonable doubt that a person qualifies for confinement. Fifth, consistent with its narrowly focused goals, it requires treatment outside the Department of Corrections.

> Sixth, it has adequate provisions for continuing reviews to ensure that only those persons representing a continuing danger are confined and treated. App. 46a.

The dissent found *Foucha* distinguishable:

> It is immediately apparent that *Foucha* is unlike the present case in the very areas that made the Louisiana statute in *Foucha* most offensive. First, under our Act there is no mechanism whereby a person can be confined while mentally healthy solely on the basis of supposed dangerousness. Second, under our Act the burden of proving an ailment of the mind and dangerousness remains always on the State, and always at the high burden of beyond a reasonable doubt. App. 39a-40a.

The dissent observed that "a person subject to the Act could hardly be considered to be mentally healthy." App. 28a. It also opined that "[t]here is no justification for linking constitutional standards to the shifting sands of academic thought reflected in the DSM-IV and its frequent revisions," noting that manual's caveat that "[t]he clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments . . . ." App. 44a-45a.

REASONS FOR GRANTING THE WRIT

I. THE KANSAS SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS OF THE SUPREME COURTS OF WASHINGTON AND WISCONSIN WHICH HAVE REJECTED IDENTICAL SUBSTANTIVE DUE PROCESS CHALLENGES TO SEX PREDATOR STATUTES

The Kansas statute at issue in this case, Kan. Stat. Ann. § 59-29a01 *et seq.*, is not unique. At least four other states have virtually identical or similar sex predator statutes. *See* Wash. Rev. Code § 71.09 *et seq.*; Wis. Stat. Ch. 980; Minn. Stat. § 253B.02, subd. 18b; Cal. Welf.

& Inst. Code § 6600 *et seq.* At this time, the Washington Supreme Court and the Wisconsin Supreme Court have upheld their statutes against substantive due process challenges substantially identical to those presented here. *In re Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993); *State v. Post*, 197 Wis. 2d 279, 541 N.W.2d 115 (1995). As previously noted, the opinion of the Kansas Supreme Court in this case expressly disagreed with the Washington decision; while that opinion did not mention the then relatively recent Wisconsin decision, the dissenting opinion noted that conflict as well and contended that "Kansas should join the decisions of the Supreme Courts of Washington and Wisconsin . . ." App. 24a (citations omitted).

Additionally, lower state courts have rejected substantive due process challenges to the Minnesota and California sexually violent predator statutes. *In re Linehan*, 544 N.W.2d 308 (Minn. Ct. App. 1996); *State v. Hubbart*, No. 140294 (Cal. Super. Ct. Santa Clara County Feb. 9, 1996) (Appendix D, App. 73a-76a). As previously noted, a federal district court, in *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995), has declared the Washington statute unconstitutional in disagreement with that state's Supreme Court.[18]

Given the extreme public importance of the questions presented, and the compelling interests at stake on both sides of these issues, this sharp split of authority warrants the Court's immediate attention.

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[18] Review has been granted by the Minnesota Supreme Court in *In re Linehan*, a petition for review of *State v. Hubbart* is currently pending in the California Supreme Court and, as previously noted, an appeal from *Young v. Weston* is pending in the Ninth Circuit.

II. THIS CASE RAISES IMPORTANT, UNRESOLVED SUBSTANTIVE DUE PROCESS QUESTIONS ON WHICH THE COURTS AND STATE LEGISLATURES DESPERATELY NEED GUIDANCE IN THEIR EFFORTS TO DEAL WITH SEXUALLY VIOLENT PREDATORS IN A CONSTITUTIONAL FASHION

The lower court decisions addressing the constitutionality of these sexual predator statutes have turned in large part upon those courts' understanding of this Court's decision in *Foucha v. Louisiana*, 504 U.S. 71 (1992). The Kansas Supreme Court has read *Foucha*—and its reliance upon *Addington v. Texas*, 441 U.S. 418 (1979)—as imposing two substantive due process limitations on any involuntary civil commitment to a mental health facility for care and treatment. These perceived limitations are that the person be both (1) "mentally ill" and (2) dangerous. *See* App. 19a; *see also Young v. Weston*, 898 F. Supp. at 749; *In re Young*, 857 P.2d at 1001. It is only the former limitation that is in issue here.

Foucha, of course, dealt with a problem and a statutory scheme significantly different from those addressed by the sexual predator statutes. The question there—on which there was considerable division among this Court's four opinions as to both outcome and rationale—was whether a defendant who had been acquitted by reason of insanity could be retained in custody indefinitely notwithstanding that he was no longer mentally ill but was characterized only as having an "antisocial personality," 504 U.S. at 78, under a statutory scheme which requires no affirmative proof of dangerousness but rather "places the burden on the detainee to prove that he is not dangerous," *id.* at 81-82. Here, in contrast, the State of Kansas has met a statutory burden of proving, beyond a reasonable doubt, that Respondent Hendricks both has a "mental abnormality" predisposing him to engage in predatory acts of sexual violence and is dangerous because he is likely to engage in such acts if he is at large.

None of the lower court decisions questions the well settled proposition that individuals subject to involuntary civil commitment under sex predator statutes have a constitutionally protected liberty interest at stake,[14] nor does Petitioner here. In this context, however, at least two important questions remain unclear after *Foucha*. First, what level of review applies to substantive due process challenges to the sex predator statutes? Second, even if the level of review is strict scrutiny, does a statute like the Kansas Sexually Violent Predator Act pass constitutional muster?

Were less significant or non-constitutional interests at stake in these cases, it might be appropriate for this Court to await further development of the difficult issues presented. But given the importance of the liberty interests and public safety concerns present in these cases, it is appropriate for this Court to provide definitive answers at this time. State policymakers and the lower federal and state courts urgently require guidance from this Court in order to assess the constitutionality of the various options that states might consider implementing to deal with the very serious problem of sexually violent predators.

A. This Court's Decision In *Foucha v. Louisiana* Does Not Make Clear What Level Of Constitutional Scrutiny Applies

Justice White's opinion for the Court in *Foucha* nowhere identifies the level of review the Court was applying to Foucha's substantive due process claim. The critical part of the opinion, 504 U.S. at 80-83, never invokes the concept of "strict scrutiny." It does, however, observe

[14] *See, e.g., Vitek v. Jones*, 445 U.S. 480, 492 (1980) ("The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement."); *Foucha*, 504 U.S. at 80; *Jones v. United States*, 463 U.S. 354, 361 (1983); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982).

that "the Louisiana scheme of confinement is not carefully limited," *id.* at 81, and also asserts that, if Foucha had committed crimes while in state custody, "the state does not explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction," *id.* at 82. Lastly, in distinguishing *United States v. Salerno*, 481 U.S. 739 (1987)—which upheld a federal statute permitting pretrial detention without bail on the ground of dangerousness—Justice White opines that "[i]t was emphasized in *Salerno* that the detention we found constitutionally permissible was strictly limited in duration." 504 U.S. at 82. These observations sound somewhat like the language this Court often uses when discussing the narrow tailoring requirement of the strict scrutiny test, but Justice White's opinion never expressly invokes those concepts.

Similarly, the concurring opinion of Justice O'Connor, who provided the fifth vote for the outcome in *Foucha*, does not expressly state the level of review to be applied to Foucha's substantive due process claim. Justice O'Connor does, however, indicate that Louisiana might be permitted constitutionally to confine a person in a different situation where "the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness." 504 U.S. at 87-88 (O'Connor, J., concurring). Again, this sounds somewhat like the language this Court often uses when discussing the narrow tailoring requirement of the strict scrutiny test, but Justice O'Connor does not expressly invoke those concepts.

Justice Kennedy's *Foucha* dissent (joined by the Chief Justice) opines that the Court failed "to recognize that the conditions for incarceration imposed by the State in this case are in accord with legitimate and traditional state interests, vindicated after full and fair procedures." 504 U.S. at 90 (Kennedy, J., concurring). This statement, at the least, does not sound like strict scrutiny.

Only Justice Thomas' dissent (joined by the Chief Justice and Justice Scalia) expressly addresses the point, articulating the view that strict scrutiny should *not* apply to Foucha's substantive due process claim:

> Until today, I had thought that the analytical framework for evaluating substantive due process claims was relatively straightforward. Certain substantive rights we have recognized as "fundamental"; legislation trenching upon these is subjected to "strict scrutiny," and generally will be invalidated unless the State demonstrates a compelling interest and narrow tailoring. Such searching judicial review of state legislation, however, is the exception, not the rule, in our democratic and federal system; we have consistently emphasized that "the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable." Except in the unusual case where a fundamental right is infringed, then, federal judicial scrutiny of the substance of state legislation under the Due Process Clause of the Fourteenth Amendment is not exacting.
>
> In striking down Louisiana's scheme as a violation of substantive rights guaranteed by the Due Process Clause, the Court today ignores this well-established analytical framework. First, the Court never explains whether we are dealing here with a fundamental right, and, if so, what right. Second, *the Court never discloses what standard of review applies.* Indeed, the Court's opinion is contradictory on both these critical points.

504 U.S. at 115-16 (Thomas, J., dissenting) (emphasis added) (citations omitted). Justice Thomas went on to observe that "this Court has *never* applied strict scrutiny to the substance of state laws involving involuntary confinement of the mentally ill, much less to laws involving the confinement of insanity acquittees. To the contrary, until today we have subjected the substance of such laws only to very deferential review." *Id.* at 119. Justice Thomas then warned that

> If the Court indeed means to suggest that *all* restrictions on "freedom from bodily restraint" are subject to strict scrutiny, it has (at a minimum) wrought a revolution in the treatment of the mentally ill. Civil commitment as we know it would almost certainly be unconstitutional; only in the rarest of circumstances will a State be able to show a "compelling interest," and one that can be served in no other way, in involuntarily institutionalizing a person. All procedures involving the confinement of insanity acquittees and civil committees would require revamping to meet strict scrutiny.

Id. at 122.

Thus, after *Foucha*, it unfortunately is not clear what level of review applies to a substantive due process challenge made to a law like the Kansas Sexually Violent Predator Act. For that reason alone, this case merits the Court's plenary review.[15]

B. This Court Should Clarify The Substantive Due Process Principles Applicable To Commitment Of Sexually Violent Predators

As we have noted, *Foucha*—contrary to the reading of the majority of the Kansas Supreme Court—does not provide clear guidelines for constitutional review of statutes such as the Kansas Sexually Violent Predator Act, either as to the level of scrutiny or as to other substantive due process factors. *Foucha* dealt with a different type of statute and focused largely on substantive and procedural

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[15] The dissenting opinion in the Kansas Supreme Court observes that "the majority fails to address directly what test should be used to measure the constitutionality of a legislative act attacked on the basis of substantive due process." App. 33a. Although the dissenters found that "the Supreme Court recently indicated in *Foucha* that our review might be somewhat less than strict scrutiny," App. 36a, they applied strict scrutiny in view of the uncertainty left by *Foucha*. They would have upheld the Kansas statute under that standard.

elements quite distinct from those presented here. Nor are clear guidelines provided by this Court's other decisions addressing substantive due process claims in the mental health context.

In *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975), this Court held that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." *Donaldson* stands for the proposition that the mentally ill cannot simply be warehoused without receiving treatment. There, however, a jury had specifically found that "Donaldson was neither dangerous to himself nor dangerous to others, and also found that, if mentally ill, Donaldson had not received treatment." *Id.* at 573.

Addington v. Texas, 441 U.S. 418 (1979), was a procedural due process case in which the Court held that traditional commitment proceedings require proof that the individual satisfies the state's substantive standards for commitment by clear and convincing evidence. In that case, the Texas law at issue required proof of both mental illness and dangerousness. *Id.* at 426. Although *Addington* was not a substantive due process case, later decisions of this Court have read the elements of (1) mental illness and (2) dangerousness into substantive due process requirements. For example, *Jones v. United States*, 463 U.S. 354 (1983), held that a defendant acquitted of a crime by reason of insanity could be confined to a mental institution until such time as he either regained his sanity or no longer presented a danger to himself or society, citing *Addington* for the proposition that "the Due Process Clause requires the State in a civil-commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous." *Id.* at 362.

Another relevant decision is *Allen v. Illinois*, 478 U.S. 364 (1986), in which this Court held that commitment proceedings under the Illinois Sexually Dan-

gerous Persons Act were not "criminal" for purposes of applying the privilege against self-incrimination. The Court recognized that the purpose of the Illinois law—like the Kansas law in this case—was to provide treatment, not punishment, for persons adjudged sexually dangerous. *Id.* at 370. The Court rejected the argument that the commitment proceedings were criminal because they were premised on the commission of a sexual offense, pointing out that the state also had to prove that the person suffered from a "mental disorder . . . and a [future] propensity to commit sexual assaults." *Id.* at 370-71. Nor did the Court agree that the state's use of procedural safeguards usually found in criminal trials made the proceedings criminal rather than civil. *Id.* at 371-72. Lastly, the Court rejected the contention that a punitive purpose was demonstrated by the placement of persons committed under the Illinois law in maximum-security institutions that also housed mentally ill inmates. *Id.* at 372. In sum, the Court concluded that the petitioner had not demonstrated that " 'sexually dangerous persons' in Illinois are confined under conditions incompatible with the State's asserted interest in treatment." *Id.* at 373.

Many of the Court's observations in *Allen* ring true with respect to the Kansas Sexually Violent Predator Act in the substantive due process context. Here, as there, confinement is for purposes of care and treatment of a mental disorder and not for punitive purposes. The Washington and Wisconsin Supreme Courts both relied upon *Allen* in part to reject substantive due process challenges to their similar sexual predator statutes.

The Washington Supreme Court concluded, under a strict scrutiny standard, that "it is irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions." *In re Young*, 857 P.2d at 1000. Focusing on the narrow tailoring requirement, the Washington Supreme Court held that the difficulty in treating sex predators does not under-

mine the state's interest in treatment or the notion that sex predators are not mentally healthy, *id.* at 1003, and that conditions of confinement like those provided by the Kansas Act are compatible with treatment, *id.* (quoting *Allen*). Similarly, the Wisconsin Supreme Court concluded in *State v. Post* that the Wisconsin Statute's requirement of proof of a "mental disorder" satisfied constitutional requirements under a strict scrutiny standard, 541 N.W.2d at 122-24, and that a primary purpose of the statute is to provide psychiatric treatment to sexually violent persons, *id.* at 124-26. Both the Washington Supreme Court and the Wisconsin Supreme Court distinguished *Foucha* and held that confinement under these laws is narrowly tailored to the purposes of the statutes. *Id.* at 126-28; *In re Young*, 857 P.2d at 1005-08.

As both the dissent below and the Wisconsin Supreme Court have noted (*see* pp. 11-12, *supra*), neither *Foucha* nor any other decision of this Court mandates any particular definition of the mental condition that must be found in order to justify civil commitment. Certainly this Court has not delegated that constitutional function to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM), which itself abjures any purpose to dictate legal conclusions, *see* p. 13, *supra*. The Kansas legislature (like those of Washington, Wisconsin, Minnesota and California) has made an express legislative finding that a person suffers from a "mental abnormality" warranting civil commitment if he or she is proven beyond a reasonable doubt to be suffering from "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others" (*see* pp. 3-4, *supra*). We urge the Court to grant certiorari to clarify whether there is anything in the Fourteenth Amendment that categorically forbids a state to act on such a legislative finding, as these states have through their Sexually Violent Predator Acts.

CONCLUSION

For the foregoing reasons, the State of Kansas respectfully requests that this Court grant this petition for a writ of certiorari and set this case for plenary review.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 73,039

IN THE MATTER OF THE CARE AND TREATMENT OF LEROY HENDRICKS,

Appellant.

Appeal from Sedgwick district court; GREGORY L. WALLER, Judge. Opinion filed March 1, 1996. Reversed.

The opinion of the court was delivered by

ALLEGRUCCI, J.: Leroy Hendricks appeals from a jury finding that he is a sexually violent predator as defined in the Sexually Violent Predator Act (the Act), K.S.A. 59-29a01 *et seq.*, and from the district court's order of commitment, which was issued pursuant to that finding. The Act establishes a procedure, which is stated to be civil, for involuntarily committing sexually violent predators for long-term care and treatment. Hendricks challenges the constitutionality of the Act and also raises various other grounds for reversing the finding and order of the district court. The case was transferred to this court from the Court of Appeals pursuant to K.S.A. 20-3018(c).

This case was initiated by the district attorney's filing on August 17, 1994, of a petition in the district court seeking commitment of Leroy Hendricks as a sexually violent predator under the Act. The petition recited that it anticipated Hendricks' release from confinement on September 11, 1994, and stated the following criminal history:

> "That on the 26th day of November, 1984 respondent Leroy V. Hendricks was convicted in the Eighteenth Judicial District, District Court, Sedgwick County, Kansas, Case No. 84CR1463 of a sexually violent offenses [*sic*] involving two victims as defined by law, to wit: K.S.A. 21-3503 Indecent Liberties with a Child; and K.S.A. 21-3503 Indecent Liberties with a Child; and has a history of prior sexual offenses from other jurisdictions, to wit: 1960 Spokane, Washington, Indecent Liberties with a Child; Seattle, Washington (1963 and 1967) Indecent Liberties with a Child (two separate cases)."

The petition further alleged that Hendricks "suffers from a mental abnormality or personality disorder which makes him likely to engage in predatory acts of sexual violence."

At the time the petition was filed, Hendricks was serving a sentence of 5 to 20 years' imprisonment. The sentence had been imposed in accordance with the State's recommendation pursuant to a plea agreement. Under the agreement, Hendricks pled guilty in November 1984 to two counts of indecent liberties with a child. The State dismissed a third count of indecent liberties and refrained from requesting imposition of the Habitual Criminal Act.

On August 19, 1994, Hendricks appeared with counsel in district court. At the beginning of the hearing, Hendricks presented a motion to dismiss the petition. Counsel argued the following grounds for dismissal: insufficient factual allegations, failure to serve Hendricks with the petition, unconstitutionality of the Act, and breach of the plea agreement. The district court allowed the State to present evidence. In a journal entry filed on August 23, 1994, the district court found no fatal flaws in the petition or its service and reserved ruling on the constitutionality of the Act and the argument that the State was estopped by virtue of the plea agreement.

The district court concluded that there was probable cause to believe that Hendricks is a sexually violent predator as defined in the Act and that he should be evaluated at Larned State Security Hospital to determine if he is.

Upon advice of counsel, Hendricks did not participate in the evaluation at the state hospital. As a result, the first report issued by the hospital was based on available records and behavioral observations during his stay. After ruling that the nature of the Act is civil rather than criminal or quasi-criminal so that the privilege against self-incrimination does not apply, the district court granted the State's request for an order compelling discovery. The district court ordered another evaluation and ordered Hendricks to cooperate in it.

A jury trial was conducted October 3-5, 1994. Hendricks was called as a witness by the State. He testified that he was 60 years old, that his history of sexual involvement with children began with his exposing himself to two girls in 1955, and that he had spent approximately half the time since then in prison or in psychiatric institutions. He explained that when he gets "stressed out," he is unable to control the urge to engage in sexual activity with a child. Hendricks agreed that he is a pedophile and that he is not cured of the condition.

The State also called Charles Befort, the chief psychologist at Larned State Hospital. He testified that a personality disorder consists of traits or characteristics which tend to produce in most situations predictable but unacceptable or abnormal behavior. He testified that a pedophile is predisposed to commit sexual acts with children and that pedophilia in and of itself is not considered to be a personality disorder. Dr. Befort testified that during the previous week he had performed an evaluation of Hendricks. Dr. Befort believed it likely that Hendricks would engage in predatory acts of sexual violence or sexual activity with children if permitted to do so. The

factors upon which he based this opinion were the aphorism that "behavior is a good predictor of future behavior," his professional knowledge that pedophiles tend to repeat their behavior, and Hendricks' poor understanding of his behavior. He testified that he did not believe Hendricks was mentally ill or had a personality disorder but that, as he interpreted the Act, pedophilia was a mental abnormality. He agreed that his interpretation of the statute was open to debate.

William Logan, a forensic psychiatrist, testified on behalf of Hendricks. He testified about re-offense rates for sex offenders, as shown by various studies. Re-offense rates for persons who had received treatment ranged from 3 to 37½ percent; for untreated persons the range was 10 to 40 percent. Dr. Logan expressed the opinion that, based on current knowledge, "a psychiatrist or psychologist cannot predict whether an individual is more likely than not to engage in a future act of sexual predation."

The jury found that Hendricks is a sexually violent predator. He was committed to the custody of the Secretary of Social and Rehabilitation Services (SRS). Hendricks filed a motion to dismiss or, in the alternative, for a new trial which was based in part on evidence that apart from the regular staff of Larned State Hospital, professionals specifically dedicated to a treatment program for sexually violent predators were not available at the hospital. Although it had negotiated with two bidders who proposed to provide care and treatment under the Act, as of October 20, 1994, SRS had not entered into a contract with either. The motion was denied, and the district court ordered that Hendricks be transported to Larned State Security Hospital.

The Act is a product of the 1994 legislative session. It is patterned on a very similar statutory scheme enacted in the state of Washington in 1990. Wash. Rev. Code § 71.09.010 *et seq.* (1992). A divided Washington Supreme Court held that that state's Act was constitutional in *Personal Restraint of Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993). Thereafter, the United States District Court for the Western District of Washington disagreed with the Washington Supreme Court and granted Young's petition for writ of habeas corpus. *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995). The district court concluded that the Washington act "violates the substantive due process component of the Fourteenth Amendment, the Ex Post Facto Clause, and the Double Jeopardy Clause." *Young*, 898 F. Supp. at 754. We will revisit these cases later in this opinion.

The legislature's stated reasons for enacting a comprehensive scheme for commitment of sexually violent predators appear in K.S.A. 59-29a01:

> "The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under K.S.A. 59-2901 et seq. and amendments thereto, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for re-

habilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different [from] the traditional treatment modalities for people appropriate for commitment under the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, therefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature."

This section is virtually identical to Wash. Rev. Code § 71.09.010 (1992).

In K.S.A. 59-29a02, terms are defined as they are used in the Act. The following are relevant to our determination:

"(a) 'Sexually violent predator' means any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.

"(b) 'Mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

. . . .

"(e) 'Sexually violent offense' means:

. . . .

(2) indecent liberties with a child as defined in K.S.A. 21-3503 and amendments thereto."

The legislature apparently anticipated that the principal use of the commitment procedure would follow incarceration. K.S.A. 59-29a03 provides that 60 days before the anticipated release of a person who may meet the criteria of a sexually violent predator, the agency with authority over the release must notify the prosecutor in the county where the person was charged. K.S.A. 59-29a04 prescribes initiation of the commitment procedure:

"When it appears that the person presently confined may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition, within 45 days of the date the prosecuting attorney received the written notice . . . alleging that the person is a sexually violent predator and stating sufficient facts to support such allegation."

In the next step, a judge determines whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If so, the person is transferred to an appropriate facility for a professional evaluation. K.S.A. 59-29a05.

K.S.A. 59-29a06 provides that "[w]ithin 45 days after the filing of a petition . . . the court shall conduct a trial to determine whether the person is a sexually violent predator." It further provides that the person is entitled to counsel and professionals "to perform an examination [on] such person's behalf." Last, it provides that trial will be to the court in the absence of a jury demand, but that a written jury demand filed at least 4 days before trial by petitioner, respondent, or the judge will be honored. K.S.A. 59-29a07(a) provides that a determination that the person is a sexually violent predator must be made "beyond a reasonable doubt" or the person must be released. Where the court or jury is satisfied beyond a reasonable doubt that the person is a sexually violent predator,

"the person shall be committed to the custody of the secretary of social and rehabilitation services for con-

> trol, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. Such control, care and treatment shall be provided at a facility operated by the department of social and rehabilitation services." K.S.A. 59-29a07(a).

K.S.A. 59-29a08 requires an annual "examination of the person's mental condition" and an annual court review of the status of the committed person for the purpose of determining whether "probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged." If so, the court will schedule a hearing at which the burden of proof "shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and if released is likely to engage in acts of sexual violence."

Another means of release is set out in K.S.A. 59-29a10:

> "If the secretary of the department of social and rehabilitation services determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released, the secretary shall authorize the person to petition the court for release. . . . The hearing shall be before a jury if demanded by either the petitioner or the county or district attorney or attorney general."

The burden of proof is the same as it would be at a hearing on an annual review. K.S.A. 59-29a10. The committed person may file a petition seeking release at any time, but broad restrictions apply to petitioning for discharge without approval of the Secretary of SRS and make release through this avenue seem improbable. See K.S.A. 59-29a11.

K.S.A. 59-29a13 provides that "prior to the release of a person committed under this act, the secretary of the department of social and rehabilitaton services shall give written notice of such release to any victim of the person's activities or crime."

Hendricks challenges the constitutionality of the Act on various grounds, alleging the Act violates both the United States and Kansas Constitutions. He argues the Act violates the prohibition against double jeopardy and ex post facto laws, fails to provide equal protection and procedural or substantive due process, and is void as overly broad and vague.

We first consider Hendricks' substantive due process challenge. In so doing, we must presume the Act is constitutional and resolve all doubts in favor of the Act's validity. If there is any reasonable way to construe the Act as constitutionally valid, we must do so. The Act must clearly violate the Constitution before it may be struck down. See *Sedlak v. Dick*, 256 Kan. 779, 793, 887 P.2d 1119 (1995); *Chiles v. State*, 254 Kan. 888, 897, 869 P.2d 707, *cert. denied* 130 L. Ed. 2d 88 (1994); *Boatright v. Kansas Racing Comm'n*, 251 Kan. 240, 243, 834 P.2d 368 (1992). The burden of proof is on the party challenging the constitutionality of the Act.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits a State's depriving any person of liberty "without due process of law." It "contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Burch*, 494 U.S. 113, 125, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990).

Hendricks contends that his substantive due process liberty interest is violated by indefinite confinement under K.S.A. 59-29a01 *et seq.* He relies on *Foucha v. Louisi-*

ana, 504 U.S. 71, 118 L. Ed. 2d 437, 112 S. Ct. 1780 (1992). He represents the case as holding that due process prohibits a person's being involuntarily committed by a civil proceeding absent a finding that the person is both mentally ill and dangerous. It is his contention that the Act's requirement of a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence falls short of a finding of mental illness. He points out that "[t]he express purpose of the statutory scheme . . . is to confine persons 'who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons . . . .' K.S.A. 59-29a01."

As a criminal defendant charged with aggravated burglary and illegal discharge of a firearm, Foucha, in 1984, had been found by a Louisiana trial court not guilty by reason of insanity. Under Louisiana law he was committed to a psychiatric hospital, whether or not he was then insane, absent proof that he was not dangerous. Release under the Louisiana law depended on proof by Foucha that he was not dangerous. In the United States Supreme Court it was Foucha's contention "that this scheme denies him due process and equal protection because it allows a person acquitted by reason of insanity to be committed to a mental institution until he is able to demonstrate that he is not dangerous to himself and others, even though he does not suffer from any mental illness." 504 U.S. at 73.

In 1988, the superintendent of the facility in which Foucha was confined recommended that he be discharged or released. A three-member panel recommended that he be conditionally discharged. The two doctors appointed by the trial judge as a "sanity commission" agreed that Foucha's psychosis probably had been drug-induced, that he had recovered from that temporary condition, and that he showed no signs of psychosis or neurosis, but that

he has "an antisocial personality, a condition that is not a mental disease and that is untreatable." 504 U.S. at 74. Thus, the doctors declined to certify that Foucha would not be a danger to himself or others. His confinement, therefore, was continued.

The Superme Court's analysis began with *Addington v. Texas*, 441 U.S. 418, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979), in which it was

> "held that to commit an individual to a mental institution in a civil proceeding, the State is required by the Due Process Clause to prove by clear and convincing evidence the two statutory preconditions to commitment: that the person sought to be committed is mentally ill and that he requires hospitalization for his own welfare and protection of others." *Foucha*, 504 U.S. at 75-76.

A person who has been found not guilty of a criminal offense by reason of insanity, however, may be committed by a State "without satisfying the *Addington* burden with respect to mental illness and dangerousness." 504 U.S. at 76, citing *Jones v. United States*, 463 U.S. 354, 363, 77 L. Ed. 2d 694, 103 S. Ct. 3043 (1983), where the Supreme Court reasoned that guilt by reason of insanity established that (1) because of mental illness, (2) the defendant committed an act which constituted a criminal offense. Therefore, the *Foucha* Court held, it "could be properly inferred that at the time of the verdict, the defendant was still mentally ill and dangerous and hence could be commited." 504 U.S. at 76. Under the Constitution, confinement could continue until the person regained his sanity or no longer presented a danger to himself or others. See 504 U.S. at 77-78; *Jones*, 463 U.S. at 368.

Foucha had regained his sanity; the basis for confining him as a defendant who was not guilty by reason of insanity no longer existed. The State perpetuated his confinement on the basis of his potentially being dangerous due

to his antisocial personality. The Supreme Court concluded that Foucha's liberty interest in being freed from indefinite confinement in a mental facility could not be defeated on that basis.

In distinguishing *United States v. Salerno*, 481 U.S. 739, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987), the Supreme Court emphasized the strict limitations of pretrial detention of persons who pose a danger. *Foucha*, 504 U.S. at 82. In this context the Court stated:

> "Here, in contrast, the State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. *The same would be true of any convicted criminal, even though he has completed his prison term.* It would also be only a step away from substituting confinements for dangerousness for our preesnt system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law." (Emphasis added.) 504 U.S. at 82-83.

The Washington Supreme Court found that Washington's sexual predator statute conformed to the due process standard of *Addington* and *Foucha*—clear and convincing proof of mental illness and dangerousness. *Personal Restraint of Young*, 122 Wash. 2d 1, 27, 857 P.2d 989 (1993). The requirement that commitment be predicated on dangerousness is said to be satisfied under the definition of sexually violent predator. Wash. Rev. Code § 71.09.020(1) (1992) defines a sexually violent predator as a person "likely to engage in predatory acts of sexual violence."

With regard to the requirement of mental illness, the court reasoned that the terms "mental abnormality," "mental disorder," and "mental illness" "are largely synonymous." 122 Wash. 2d at 27 n.3. Thus, the reasoning continues, by defining a sexually violent predator as a person who suffers from a mental abnormality or personality disorder, the requirement is satisfied. At the heart of the court's reasoning is a selective and inconsistent use of the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d ed. rev. 1987) (hereafter cited as DSM-III-R). On the one hand, the court reasons that because "anti-social personality disorder" is defined in the DSM-III-R, it is a mental disorder, 122 Wash. 2d at 30, and on the other hand, that "mental abnormality" is a mental disorder, notwithstanding that it is not defined as such in the DSM-III-R. Simply stated, mental illness means whatever the Washington court says it means; it is this reasoning which was the basis for the court's conclusion that the Washington act did not conflict with *Foucha*.

The apparent inconsistency with Foucha's having an antisocial personality *rather than* being mentally ill was at first glossed over by the Washington majority, which noted that Young suffered from an antisocial personality disorder, which "is classified as a mental disorder in the *DSM-III-R*." 122 Wash. 2d at 30. In a subsequent footnote, the majority offered the following justification:

> "Petitioners raise the issue that, under *Foucha*, it is impermissible to civilly commit someone who has an 'antisocial personality,' because that condition is not a mental disorder. According to petitioners, the sex predator Statute violates this holding. This argument belies a careless reading of the *Foucha* facts. First, the condition in *Foucha* was an 'antisocial per-

> sonality.' This condition falls within the *DSM-III-R* section entitled 'V Codes for Conditions Not Attributable to a Mental Disorder' and is formally designated 'antisocial behavior'; it is not a mental disorder. As such, anti-social behavior cannot form the basis for civil commitment. *Foucha v. Louisiana* (112 S. Ct. 1780). The sex predator Statute, however, requires proof of a 'personality *disorder*' as one of the alternative means of commitment. (Italics ours.) RCW 71.09.020. Unlike 'antisocial behavior,' an 'antisocial personality disorder' is a recognized mental disorder which is defined in the *DSM-III-R*, at 342." *Young*, 122 Wash. 2d at 37 n.12.

The Washington court's dissenters disputed this rationale. Their precept was that "the Statute . . . fails to meet the mental illness requirement." 122 Wash. 2d at 61. Thus, "[l]ike the statute in *Foucha*, [the Washington statute] violates substantive due process because it requires only dangerousness and not mental illness as a prerequisite to commitment." 122 Wash. 2d at 63. It was suggested in the dissenting opinion that the majority indulged in "psychiatric incantations." 122 Wash. 2d at 65. The dissenting justices warned that "by authorizing the indefinite confinement in mental facilities of persons who are not mentally ill, the Statute threatens not only the liberty of certain sex offenders, but the liberty of us all." 122 Wash. 2d at 60. The dissenting justices recognized the insidious effect of sanctioning the separation of the commitment of sexually violent predators from the statutory procedure for the commitment of the mentally ill. Once that is accomplished, the same reasoning could be applied to anyone who commits any designated offense and is labeled "mentally abnormal" or suffering from an "antisocial personality disorder."

Foucha also was a focus for the federal district court in *Young*, which agreed with the dissenting Washington

justices that there is no mental illness requirement in the statute. 898 F. Supp. at 749. The district court noted:

> "The absence of a mental illness requirement is apparent both in the statutory language and in its legislative history. First, the legislature's findings expressly disavow the notion that the targeted group of persons are mentally ill. As explained in Wash. Rev. Code § 71.09.010, the target group is made up of individuals 'who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act.' Unlike persons with serious mental disorders, the legislature concluded, sexual predators 'have antisocial personality features which are unamenable to existing mental illness treatment modalities,' and for which the prognosis of cure is poor." 898 F. Supp. at 749.

After examining the statutory language and legislative history, the district court concluded

> "that the Sexually Violent Predator Statute, allowing as it does the indefinite confinement of persons who are not mentally ill, violates the substantive protections of the Due Process Clause. Predictions of dangerousness alone are an insufficient basis to continue indefinitely the incarceration of offenders who have completed their prison terms." 898 F. Supp. at 751.

It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. The legislature concedes that sexually violent predators are not amenable to treatment under K.S.A. 59-2901 *et seq*. If there is nothing to treat under 59-2901, then there is no mental illness. In that light, the provisions of the Act for treatment appear somewhat disingenuous. The federal district court in *Young* observed:

"The Statute forecloses the possibility that offenders will be evaluated and treated until after they have been punished. Of course, it defies reason to suggest that the mental abnormalities or personality disorders causing violent sexual predation surface only at the termination of a prison term. Common sense suggests that such mental conditions, if they are indeed the cause of sexual violence, are present at the time the offense is committed. Setting aside the question of whether a prison term exacerbates or minimizes the mental condition of sex offender, it plainly delays the treatment that must constitutionally accompany commitment pursuant to the Statute. The failure of the Statute to provide for examination or treatment prior to the completion of the punishment phase strongly suggests that treatment is of secondary, rather than primary, concern." 898 F. Supp. at 753.

It is clear that the primary objective of the Act is to continue incarceration and not to provide treatment. Protecting the public is a legitimate exercise of the State's police power. Although the Act is a well-intentioned attempt by the legislature to accomplish that objective, it cannot be done in a constitutionally impermissible manner. Having said that, we need to point out that the legislature has provided the State with other options to achieve that objective and, in addition, has the authority to increase the penalty for sex crimes committed against children.

The record indicates that Hendricks had at least three felony convictions prior to being charged with the present case. Under the Habitual Criminal Act, Hendricks' sentence could have been tripled. Also, Hendricks could have been sentenced to the maximum rather than the minimum sentence. Additionally, the sentences could have been ordered to run consecutively rather than concurrently. The State chose not to pursue any of these options. Instead, the State opted to enter into a plea bar-

gain with Hendricks. The State agreed to dismiss one count, to recommend the statutory minimum sentence of 5 to 20 years, and to not seek imposition of the Habitual Criminal Act.

The State now chooses to pursue the option under the Act to continue Hendricks' incarceration. The State contends that commitment under the Act requires "a finding of mental illness and dangerousness . . . consistent with *Foucha*." The only authority cited by the State is a passage from *Young* in which the Washington Supreme Court addresses only the element of dangerousness, never mentioning mental illness.

We find no support in the Act that a finding of mental illness is required. As noted by the federal district court in *Young*, there is an absence of a mental illness requirement in the language of the Washington Act. K.S.A. 59-29a01 states that sexually violent predators do not have a mental illness which "renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill person defined in K.S.A. 59-2901 et seq." The statute then contrasts sexually violent predators with "persons appropriate for civil commitment under K.S.A. 59-2901 et seq." in that they have "antisocial personality features which are unamenable to existing mental illness treatment modalities." By such language, the legislature recognizes that sexually violent predators are not mentally ill but, rather, have an "antisocial personality feature" or a "mental abnormality."

Hendricks takes the position that, on the record in this case, the reasoning employed by the Washington court in upholding the constitutionality of its statute has no support. In other words, the record in this case will not support a finding that the statutory requirement of a mental abnormality or a personality disorder is equivalent to the constitutional standard of mental illness. We agree.

The State's principal evidence concerning Hendricks' mental state was the testimony of Charles Befort, the chief psychologist at Larned State Security Hospital. He testified that he did not believe Hendricks was mentally ill or had a personality disorder. Dr. Befcrt described a person with a personality disorder as

> "an individual who has a set of characteristics or traits that are enduring; that is, traits or characteristics that tend to result in their behaving in fairly standard predictable ways through most situations. Now, we all have those things, those traits and characteristics. It becomes a disorder when those traits and characteristics result in the person behaving or thinking, perhaps, or otherwise acting in such a way that it causes them trouble, causes society trouble, is considered abnormal, then it becomes a disorder."

Dr. Befort testified that an example of a personality disorder is antisocial personality. He described persons with antisocial personalities as

> "individuals who have disregard for social expectations, social values, social norms. Their behavior indicates that disrespect or unconcern about staying within acceptable boundaries of behavior. Usually these behaviors include disregard for others' rights. They may exploit other people to those persons' detriment. In the worst cases, of course, they turn to crime, criminal behavior. In non-criminal things, they tend to be untrustworthy. They're egocentric, those types of things."

He testified that pedophilia is not considered a personality disorder but is considered a mental abnormality. As already noted, in Dr. Befort's opinion, Hendricks does not have a personality disorder. Personality disorder is not defined in the Act.

With regard to the term "mental abnormality," Dr. Befort said that it is a phrase used by clinicians to discuss

abnormality or deviance, but that it is not a diagnosis. The term is not defined in DSM-III-R. It therefore could not be used appropriately in a formal diagnosis. "Mental abnormality" is not a psychiatric or medical term but, rather, a legal term defined in the Act. K.S.A. 59-29a02(b) provides: " 'Mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." Dr. Befort testified that this definition is circular in that certain behavior defines the condition which is used to predict the behavior. In a similar regard, the federal district court in *Young* stated that in the Washington statute's use of "personality disorder," "the only observed characteristic of the disorder is the predisposition to commit sex crimes." 898 F. Supp. at 750.

We must determine if Hendricks is denied substantive due process based not on his lack of character but, rather, on the merits of his challenge. Mental illness is defined in K.S.A. 59-2902(h) as meaning any person who: "(1) [i]s suffering from a severe mental disorder to the extent that such person is in need of treatment; (2) lacks capacity to make an informed decision concerning treatment; and (3) is likely to cause harm to self or others." Here, neither the language of the Act nor the State's evidence supports a finding that "mental abnormality or personality disorder," as used in 59-29a02(a), is a "mental illness" as defined in 59-2902(h). Absent such a finding, the Act does not satisfy the constitutional standard set out in *Addington* and *Foucha*. Justice White, speaking for the majority of the United States Supreme Court in *Foucha*, clearly stated that to indefinitely confine as dangerous one who has a personality disorder or antisocial personality but is not mentally ill is constitutionally impermissible. 504 U.S. at 78. Similarly, to indefinitely confine as dangerous one who has a mental abnormality is constitutionally impermissible.

In addition, the State's own evidence is that Hendricks was being committed even though he does not suffer from mental illness. Hendricks is not mentally ill, and the criminal offenses for which he was imprisoned were not the result of mental illness. Therefore, as applied to Hendricks, the constitutionality of the Act depends upon a showing of dangerousness without a finding of mental illness. Clearly, the due process standard of *Addington* and *Foucha* is not met by the Act as applied to Hendricks. We conclude that the Act violates Hendricks' substantive due process rights.

We hold that the Kansas Sexually Violent Predator Act, K.S.A. 59-29a01 *et seq.*, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Having so held, we need not consider the other issues raised by Hendricks in this appeal. We note that the dissenters have chosen to consider and decide those issues, notwithstanding that they have not been addressed or decided by the majority. That part of the dissent is dicta and for that reason does not warrant a response.

The judgment of the district court is reversed.

LOCKETT, J., concurring: This case illustrates better than most that the process of judicial decision is often difficult to exercise. The hard fact is that sometimes we make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution as we see them compels the result.

Our colleagues in dissent advance powerful public policy arguments as to why the Kansas Sexually Violent Predators Act (Act) should be found not to violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. With all due respect to those views, I do not believe that the Constitution gives us the right to rule as the dissenting members of the court urge. In this concurring opinion, I will set out my

reasoning for joining Justice Allegrucci's majority opinion.

The dissent disagrees with the basic premise, the underlying reasoning, and the decision of the majority that the Act violates the due process clause of the Fourteenth Amendment to the United States Constitution. The dissent bases its reasoning on the decisions of the Supreme Courts of Washington and Wisconsin "which are almost identical and substantially similar legislation in their respective states." The dissent failed to note that a United States District Court disagreed with the decision of the Washington Supreme Court and declared the similar Washington sexual violent predator act an unconstitutional violation of the Due Process, Ex Post Facto, and Double Jeopardy Clauses of the federal Constitution when the same offender later petitioned the district court for a writ of habeas corpus. *Young v. Weston*, 898 F. Supp. 744 (D. Wash. 1995).

The United States Constitution is our primary governing document. The Constitution permits the State to remove criminals and the mentally ill from society. Criminals and the mentally ill have separate rights under the Constitution. Under the Constitution, criminals have the rights of equal protection and due process and cannot be cruelly or unusually punished or punished twice for the same crime. The mentally ill have the rights of equal protection and due process and cannot be punished for being mentally ill.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that before an individual may be involuntarily committed for control, care, and treatment, the State must prove by clear and convincing evidence that the individual is both mentally ill and dangerous. Under our statutory law a mentally ill person is any person who: (1) is suffering from a severe mental disorder to the extent that such person is in need of treatment; (2) lacks capacity to

make an informed decision concerning treatment; and (3) is likely to cause harm to self or others. K.S.A. 59-2902(h). Individuals who are mentally ill may be civilly committed. The State is required to treat these individuals while committed and release them when the statute no longer applies.

A criminal may be sentenced to imprisonment because he or she broke the law and is a danger to others. Some individuals who commit crimes have a personality disorder termed antisocial. An antisocial person is an individual who has disregard for social expectations, social values, and social norms. The person's behavior indicates a disrespect or unconcern about staying within acceptable boundaries of behavior. Usually the behavior includes disregard for others' rights. The antisocial person may exploit another to that person's detriment. In the worst cases, the individual turns to crime.

Leroy Hendricks has an antisocial personality. He is not mentally ill and could not be committed for treatment to protect society. Hendricks committed sex crimes against children. He was sentenced and imprisoned for those crimes. Without violating the Constitution, the State could have incarcerated Hendricks uhtil he exhaled his last breath and his spirit departed this earth, but it did not. Hendricks has now served the criminal sentence imposed by the State and under the law must now be released, even if he has an antisocial personality.

In an effort to protect society from individuals, such as Hendricks, who are antisocial and will in all probability commit other sex crimes when released from prison, the Act was enacted. The Act reclassifies persons to be mentally ill who are antisocial, a danger to others, and have been convicted of a specific sex crime. The effect is that the criminal is reclassified as a mentally ill person. The Act permits the State to civilly commit the criminal for treatment as a mentally ill person because of a past criminal act and the fact that the individual has an antisocial personality.

The purpose of having a federal Constitution is to insure equal justice nationwide. In any action where there is a question regarding the United States Constitution, state courts have the power to determine whether the act or action violates the United States Constitution. State courts cannot disregard prior decisions of the United States Supreme Court which interpret the United States Constitution.

The United States Supreme Court in *Foucha v. Louisiana*, 504 U.S. 71, 118 L. Ed. 2d 437, 112 S. Ct. 1780 (1992), noted that to commit an individual to a mental institution in a civil proceeding, the State is required by the Due Process Clause to prove by clear and convincing evidence the two statutory preconditions to commitment: The person sought to be committed is mentally ill, and the person requires hospitalization for his or her own welfare and the protection of others.

The State of Louisiana asserted that because an individual, like Hendricks here, once committed a criminal act and now has an antisocial personality which sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, the individual may be held indefinitely as being mentally ill. The United States Supreme Court stated that rationale would permit the State to hold indefinitely any other insanity acquittee, not only the mentally ill, who could be shown to have a personality disorder which may lead to criminal conduct. It noted that the same would be true of any convicted criminal, even though the person has completed his or her prison term. The *Foucha* Court pointed out that it would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law. The Supreme Court held that a convicted criminal, such as Hendricks, may not be held as a mentally ill person because of criminal dangerousness.

Because the Washington act, which is almost identical and substantially similar legislation to the Kansas act, was declared unconstitutional by the federal court, and the reasoning of the majority follows the prior decisions of the Supreme Court of the United States, I must join the majority.

In this instance we may not be the court of last resort. Under the rules of the United States Supreme Court, the State may seek a writ of certiorari, and that Court has the power to make the final determination.

LARSON, J., dissenting: I disagree with the basic premise, the underlying reasoning, and the conclusion of the majority that the Kansas Sexually Violent Predator Act (the Act) K.S.A. 59-29a01 *et seq.* violates the substantive aspect of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Kansas should join the decisions of the Supreme Courts of Washington (*Personal Restraint of Young*, 122 Wash. 2d 1, 857 P.2d 989 [1993]) and Wisconsin (*State v. Post*, 197 Wis. 2d 279, 541 N.W. 115 [1995]; *State v. Carpenter*, 197 Wis. 2d 252, 541 N.W. 105 [1995]) in upholding the validity of almost identical and substantially similar legislation in their respective states.

I would affirm the jury's finding that Leroy Hendricks is a sexually violent predator requiring care and treatment by the Secretary of Social and Rehabilitation Services (SRS) of the State of Kansas. In my analysis, I will first consider the Act, more closely examine the evidence, set forth my specific disagreements with the majority holding, then briefly show why the multiple claims of invalidity of the Act should fail and the decision of the trial court should be affirmed.

History and provisions of the Kansas Sexually Violent Predator Act, K.S.A. 59-29a01 et seq.

The issues raised in this appeal require the interpretation of the Act. The interpretation of a statute is a question of law over which our review is unlimted. *State v. Donlay*, 253 Kan. 132, Syl. ¶ 1, 853 P.2d 680 (1993). We begin the process by reviewing the history and provisions of the Act.

The 1994 Kansas Legislature, in response to the urging of an Ad Hoc Sexual Offender Task Force given impetus by the parents of Stephanie Schmidt (see *State v. Gideon*, 257 Kan. 591, 894 P.2d 850 [1995]), proposed, debated, and passed S.B. 525. Senator Bob Vancrum, before the Senate Judiciary Committee on February 22, 1994, stated it was designed "to protect our communities from those offenders who pose the greatest danger to society by providing for treatment and commitment of sexually violent predators until they are no longer a danger."

Senator Vancrum further said: "The bill is narrowly tailored to focus on the smaller number of habitual sex offenders who, because of their psychological makeup, pose an immediate danger to the public as soon as they are released from prison."

The debate prior to the bill's passage was intensified by law enforcement officials' statements of frustration at knowing that a soon-to-be-released sexual offender was likely to victimize another woman or child, testimony of Special Assistant Attorney General (now Attorney General) Carla J. Stovall to the House Judiciary Committee, March 21, 1994; and the emotional statement of a grieving father, Gene Schmidt, to the House Judiciary Committee, March 21, 1994. The debate included the measured concerns of Kelly McCaffrey, a private citizen, to the same House Judiciary Committee on March 21, 1994, who stated:

> "Inevitably, several terms and definitions used in SB 525 will be a source of great consternation for some

opponents of the bill, particularly those on the field of psychiatry. Such terms include 'sexual violent predator,' 'mental abnormality,' and 'personality disorder.' The argument is that such terms are merely legal, with no clinically significant meaning and no recognized diagnostic use."

McCaffrey went on to state that " 'legal rules are a specialized form of language that must respond to the human experiences that gave rise to them in the first place. Yet, legal rules must also structure that response in a way that allows them to be applied consistently and reliably' " (quoting Rideout, *So What's in a Name? A Rhetorical Reading of Washington's Sexually Violent Predators Act*, 15 U. Puget Sound L. Rev. 781 [1992]).

The Act's first section, K.S.A. 59-29a01, clearly states the legislative findings:

"The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under K.S.A. 59-2901 et seq. and amendments thereto, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto is inadequate to address the

risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, therefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature."

With it apparent that the legislature intended the commitment to be civil, the Act provides the following definitions:

"(a) 'Sexually violent predator' means any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person more likely to engage in the predatory acts of sexual violence.

"(b) 'Mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

"(c) 'Predatory' means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.

"(d) "Sexually motivated' means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification." K.S.A. 59-29a02.

From the definitions, it is clear that before there can be a finding that a person is a sexually violent predator there must have been a prior charge or conviction of a sexually violent offense; the anticipated sexually violent acts must be directed against strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization; and the person must have a congenital or acquired mental condition affecting emotional or volitional capacity sufficient to predispose the commission of such predatory sexually violent acts. Nowhere is there any requirement that this "sexually violent predator" must be "mentally ill" as defined in K.S.A. 59-2902(h), although a person subject to the Act could hardly be considered to be mentally healthy.

A "sexually violent offense" is both strictly and expansively defined as (1) rape, (2) indecent liberties with a child, (3) aggravated indecent liberties with a child, (4) criminal sodomy, (5) aggravated criminal sodomy, (6) indecent solicitation of a child, (7) aggravated indecent solicitation of a child, (8) sexual exploitation of a child, (9) aggravated sexual battery, (10) comparable federal or state crimes, (11) attempts, conspiracies, or criminal solicitations of the above crimes, and (12) "any act which either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this act, has been determined beyond a reasonable doubt to have been sexually motivated." K.S.A. 59-29a02.

With this definitional background, I turn to the procedure for determining if a person is a sexually violent predator. The Act provides for written notice of anticipated release from incarceration, K.S.A. 59-29a03, the filing of a petition alleging that a person is a sexually violent predator, K.S.A. 59-29a04, and a judicial determination of whether there is probable cause to believe the person named in the petition is a sexually violent predator, K.S.A. 59-29a05.

The Act then requires the determination that a person is a sexually violent predator to be made by a court or jury. It provides for counsel to be appointed for the alleged sexually violent predator if the person is indigent, and the right to retain qualified experts or professional persons for assistance. K.S.A. 59-29a06.

The determination that a person is a sexually violent predator must be beyond a reasonable doubt by the court or by a unanimous jury, if one is requested. K.S.A. 59-29a07. (The beyond a reasonable doubt standard is materially more stringent than the "clear and convincing" standard of proof held to be required in state involuntary commitment proceedings by Fourteenth Amendment due process. *Addington v. Texas*, 441 U.S. 418, 60 L. Ed. 2d 323, 99 S. Ct. 1804 [1979]).

If the person is determined to be a sexually violent predator, the commitment is to the Secretary of SRS "for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." K.S.A. 59-29a07. The right of appeal is clearly stated, as is the procedure to be followed if a person charged with a sexually violent offense and found to be incompetent to stand trial is about to be released under K.S.A. 22-3305. K.S.A. 59-29a07(b).

The Act provides for yearly examinations of the person's mental condition, an annual court review, the right to petition for release, a hearing on the petition before a court or a jury, and the continued obligation of the State to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and that upon discharge, he or she is likely to commit predatory acts of sexual violence. K.S.A. 59-29a10. The provisions of K.S.A. 59-29a09 specifically require that "[t]he involuntary detention or commitment of persons under this act shall conform to constitutional requirements for care and treatment."

Factual Statement

Although the legal issues in this case are numerous and complicated, it basically involves a factual finding by a unanimous jury that beyond a reasonable doubt Leroy Hendricks is a sexually violent predator. To place this finding in its proper perspective, a detailed recitation of the facts presented to the jury must be considered.

Hendricks testified he is 60 years old and first exhibited unlawful sexual behavior when he was 20 years old in 1955 by exposing his genitals to two young girls. He was charged with and pled guilty to indecent exposure. In 1957 he was convicted of lewdness for playing strip poker with a teenage girl.

His sexual desire for children continued. In 1960 he molested two young boys while he worked for a carnival. This resulted in imprisonment for 3 years. Soon after he was paroled in 1963, he was arrested for molesting a 7-year-old girl and again imprisoned. Attempts were made to treat him for sexual deviance, and in 1965 he was considered to be "safe to be at large" and discharged from a hospital.

Several years later, Hendricks engaged in sex with another young boy and girl. He was again imprisoned in 1967. He refused to participate in additional sexual offender treatment and remained incarcerated until he was paroled in 1972. He had been diagnosed as a pedophile; entered into and then quit treatment; and shortly thereafter began molesting his stepdaughter and stepson. He was incarcerated in 1984 for indecent liberties and was serving that sentence when he reached his conditional release date in September 1994, which resulted in these proceedings.

It is clear that Hendricks spent roughly half of his life between the ages of 20 to 60 incarcerated and had perpetrated sexual acts against children during every period when he was not in jail. He acknowledged that to relieve

stress, he would molest children and that he hoped he would not do so again, but the only way to guarantee that he would not was for him to die. He acknowledged telling Dr. Charles Befort, a psychologist at Larned State Security Hospital, that "treatment was bullshit."

One of the girls Hendricks exposed himself to in 1955 testified to the incident. Hendricks' stepdaughter and stepson testified as to repeated, long-term sexual abuse during their youth.

Lester Lee, a licensed clinical social worker specializing in male sexual offender treatment, testified Hendricks had a diagnosis of personality trait disturbance, passive-aggressive personality, and pedophilia.

Dr. Charles Befort testified as to his conversations with and testing of Hendricks. Dr. Befort stated that a personality disorder is a set of characteristics or traits, causing predictable behavior, which becomes a disorder when the person behaves in an abnormal manner, causing them or society trouble. He explained that ordinarily a mental abnormality is not a formal diagnosis but is a clinical phrase to discuss abnormality or deviance.

Dr. Befort testified he considered pedophilia to be a mental abnormality but that it was not necessarily a personality disorder. He did not diagnose Hendricks as having a personality disorder, nor did he find that he was "mentally ill" as the term is used in connection with commitments. Dr. Befort did opine, without objection, that Hendricks was a pedophile who was likely to engage in predatory acts of sexual violence or sexual activity with children if permitted.

Dr. Befort's testimony was based on Hendricks' interviews, his testing, and his activity prior to his last incarceration in 1984. He admitted on cross-examination that the term mental abnormality was not defined anywhere in the Diagnostic and Statistical Manual of Mental Disorders (3d ed. rev. 1987 and 4th ed. rev. 1995) pub-

lished by the American Psychiatric Association (hereafter cited as DSM-IV), that the causes of behavior are multi-dimensional, and that "likely to" means a more than 50 percent chance that the person will engage in predatory acts of sexual violence at some point in the future. Dr. Befort reiterated on cross-examination that it was his opinion that Hendricks was a sexually violent predator as defined by the statute.

Hendricks testified briefly on his own behalf that he was divorced and had no intention of reestablishing a relationship with his former wife. Hendricks' principal witness was Dr. William S. Logan, a forensic psychiatrist, who, after qualifying outside the presence of the jury, expressed an opinion based on a reasonable degree of medical certainty that psychologists and psychiatrists are not able to predict with more than 50 percent accuracy the future dangerousness of a sex offender. He further opined that the reliability of such a prediction of dangerousness or re-offense of sex offenders would be less than 50 percent accurate .

Based on this testimony, the jury was instructed, without objection on appeal, and a unanimous finding was reached that Hendricks was a sexually violent predator.

Substantive Due Process

It is instructive to begin an analysis of this issue with a recitation of the rules for evaluating the constitutionality of a statute, although the importance of these presumptions becomes diminished as we weigh the ultimate balance in reaching our conclusions.

> "Long-standing and well-established rules are that the constitutionality of a statute is presumed, that all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the Constitution. Moreover, it is the duty of the court to uphold the statute under attack, whenever possible, rather than

> defeat it, and if there is any reasonable way to construe the statute as constitutionally sound, that should be done." *U.S.D. No. 503 v. McKinney*, 236 Kan. 224, 230, 689 P.2d 860 (1984).

In fact, the authority and duty of the court to construe a statute as constitutional if it can be done within the legislature's apparent intent is so strong that the court may read necessary judicial requirements into the statute. *State v. Durant*, 244 Kan. 522, Syl. ¶ 10,769 P.2d 1174, *cert. denied* 492 U.S. 923 (1989).

The use of substantive due process to invalidate a statute is particularly suspect:

> "'Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments. This is . . . only to outline Mr. Justice Black's constant reminder to his colleagues that the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable.' *Moore v. East Cleveland*, 431 U.S. 494, 543-544 (1977) (WHITE, J., dissenting)." *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225-26, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985).

The opinion of this court relies on substantive due process to declare the Act unconstitutional. However, the majority fails to address directly what test should be used to measure the constitutionality of a legislative act attacked on the basis of substantive due process. Compare *Personal Restraint of Young*, 122 Wash. 2d at 26; *State v. Post*, 197 Wis. 2d 279, 301, 541 N.W. 115 (1995). It appears to assume that if substantive due process is implicated, the legislative act is *ipso facto* un-

constitutional. Such a conclusion should not be so easily reached.

Where no fundamental right is involved, a statute attacked as violative of due process is subject to only minimal scrutiny:

> "If a statute is attacked as violating due process, the test is whether the legislative means selected have real and substantial relation to the objective sought. This rule has been restated in terms of whether the statute is reasonable in relation to its subject and is adopted in the interests of the community." *Cott v. Peppermint Twist Mgt. Co.*, 253 Kan. 452, Syl. ¶ 18,856 P.2d 906 (1993).

This standard is functionally equivalent to the rational basis test in the context of equal protection challenges. *In re Wood*, 866 F.2d 1367 (11th Cir. 1989). "Under the 'rational basis' test, if there is any rational relationship between the act and a legitimate governmental objective, the act passes muster. Under this test one challenging the constitutionality of the act bears the burden of showing no rational relationship exists between the means and the end." *State v. Risjord*, 249 Kan. 497, 501-02, 819 P.2d 638 (1991).

However, the standard is heightened where a fundamental right is involved. We held in *Farley v. Engelken*, 241 Kan. 663, 669, 740 P.2d 1058 (1987), that the "standard of scrutiny increases with the perceived importance of the right or interest involved and the sensitivity of the classification."

> "The most critical level of analysis is 'strict scrutiny,' which applies in cases involving 'suspect classifications such as race, ancestry, and alienage, *and fundamental rights expressly or implicitly guaranteed by the Constitution.*' *Farley*, 241 Kan. at 669. When applying the strict scrutiny test, the burden is placed upon the State to show there is a compelling state interest in the statute, ordinance, or regulation; otherwise it is unconstitutional." (Emphasis added.) *State v. Risjord*, 249 Kan. at 501.

Thus, when considering whether a statute violates substantive due process, the first step in the analysis is to determine whether it involves a fundamental right. If it does not, a rational basis for the enactment will be sufficient to allow it to pass constitutional muster. If a statute involves a fundamental right, the statute is then subject to strict scrutiny.

This is important because of the burden-shifting nature of strict scrutiny. When the statute, ordinance, or regulation is subject to strict scrutiny, the burden has been placed on the State to show the required compelling State interest for its action and the presumption of constitutional validity becomes greatly diminished. See *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 617, 576 P.2d 221 (1978). *But*, it does not automatically follow that the challenged statute, ordinance, or regulation is unconstitutional.

The United States Supreme Court has recently reiterated that application of strict scrutiny prescribes only the test to be applied and not the result which is to be reached. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. ——, 132 L. Ed. 2d 158, 188, 115 S. Ct. 2907 (1995) ("We wish to dispel the myth that strict scrutiny is 'strict in theory, but fatal in fact.' "). If the government action is "narrowly tailored" to the compelling interest of the State, it survives the strict scrutiny analysis.

There is no doubt that the civil commitment of sexually violent predators involves so significant a deprivation of liberty that the protections of due process are invoked. See *Foucha v. Louisiana*, 504 U.S. 71, 80, 118 L. Ed. 2d 437, 112 S. Ct. 1780 (1992); *Addington v. Texas*, 441 U.S. at 425. This clearly requires that we apply the strict scrutiny test and the analysis it involves. The question

therefore becomes whether the State has shown a sufficiently compelling interest to warrant the statute's undeniable intrusion on Hendricks' liberty and whether the commitment scheme it has adopted is narrowly tailored to serve that compelling interest.

Unfortunately, the Supreme Court recently indicated in *Foucha* that our review might be somewhat less than strict scrutiny when it stated: "Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason, which it has not put forward for such discrimination against insanity acquittees who are no longer mentally ill." *Foucha*, 504 U.S. at 86. If the State were only required to have a "particularly convincing reason" for its action, it would be a less stringent test than that required by strict scrutiny. Considering the gravity of the deprivation of liberty imposed by the statute, such increased permissiveness is, in our view, inappropriate. Therefore, our analysis is based on a strict scrutiny test, beginning with the premise that the State of Kansas has a compelling interest both in treating sexually violent predators and in protecting society from their actions. See *Vitek v. Jones*, 445 U.S. 480, 495, 63 L. Ed. 2d 552, 100 S. Ct. 1254 (1980). The ultimate question then becomes whether the Act is sufficiently narrowly tailored to serve those interests without unduly burdening individual rights.

The majority opinion suggests that the balance has already been weighed in the United States Supreme Court in favor of Hendricks and that we are therefore bound to find the Act unconstitutional. A review of the available cases, however, illustrates that we write on a relatively clean slate on the precise issues before us, and the limited authority available suggests the Act is a legitimate exercise of the legislature's power.

Addington v. Texas, 441 U.S. 418, considered the question of whether procedural due process requires more than clear and convincing evidence in support of the

State's burden before a person can be subject to involuntary civil commitment. The Court, in a unanimous decision, held that procedural due process required more than a mere preponderance of evidence, but not evidence beyond a reasonable doubt. The clear and convincing standard of proof was therefore adopted as the constitutional minimum for involuntary civil commitment.

Addington offers some guidance in the present case, but is in no sense controlling. *Addington*, as a procedural due process case, was only indirectly concerned with the substance of Texas' involuntary civil commitment laws. *Addington* did not, therefore, deal with the question of what mental condition was required to justify involuntary commitment, but only considered how certain the proof of that mental condition had to be. However, the Court considered the degree of mental pathology required in terms of evaluating the risk of error of assessment under the various standards of proof it considered.

Chief Justice Burger, in writing for a unanimous court, cautioned:

> "At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. However, there is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered." 441 U.S. at 426-27.

Thus, *Addington* tells us little more than that one may not be involuntarily committed as mentally ill without "something more serious than is demonstrated by idiosyncratic behavior." What is that "something more"? *Addington* is unequivocal: That is a question reserved largely to the states. "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum." 441 U.S. at 431. The *Addington* Court seems to reason that the degree of proof required for involuntary commitment is inversely proportional to the severity of the ailmnt of the mind. See 441 U.S. at 430-33. Therefore, since our Act requires a higher degree of proof than the constitutional minimum, the Act appears to be "narrowly tailored" to restrict its application to contexts where the interests of the State are most compelling. From the dissimilar facts of *Addington*, little more guidance can be obtained.

Jones v. United States, 463 U.S. 354, 77 L. Ed. 2d 694, 103 S. Ct. 3043 (1983), also indirectly implies that the legislature had power to enact the Act. In *Jones*, the United States Supreme Court considered whether a determination of insanity at a criminal trial under a preponderance of the evidence standard was sufficient under the Due Process Clause to justify involuntary civil commitment without regard to the length of a hypothetical criminal sentence. Under the District of Columbia statute at issue, an insanity acquittee was to be confined in a mental hospital until he proved himself no longer mentally ill or dangerous. The Supreme Court found: "A verdict of not guilty by reason of insanity establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness." 463 U.S. at 363. It is critical to understand that in the District of Columbia a defendant's insanity is established by the *Durham* test,

which excludes from punishment criminal conduct which is a product of a mental disease or defect. See *Durham v. United States*, 214 F.2d 862, 874-875 (D.D.C. 1954); *Bethea v. United States*, 365 A.2d 64, 69 n 11 (D.C. 1976). Not only did the Supreme Court find the *Durham* test sufficient to prove mental illness, it also found an insanity acquittal sufficient to support "an inference of continuing mental illness. It comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment." *Jones*, 463 U.S. at 366.

Applied here, *Jones* makes clear that a requirement that a person suffer some mental infirmity before he or she can be involuntarily committed can be satisfied by more than a single, inflexible standard. For constitutional purposes, "mental illness" is not a psychiatric diagnosis to be made in accordance with the DSM-IV, but a legal determination to be made with reference to some standard that establishes that the person suffers a condition that is an ailment of the mind, rather than mere "idiosyncratic behavior" within a range of conduct that is generally acceptable. The United States Supreme Court has clearly decided not to imbue the term "mental illness" with any specific constitutional meaning, instead showing a preference for considering the meaning applied to the term by the statutory scheme at issue. See *O'Conner v. Donaldson*, 422 U.S. 563, 574-75, 45 L. Ed. 2d 396, 95 S. Ct. 2486 (1975).

This background brings into clearer focus the exact resolve of the Supreme Court in *Foucha v. Louisiana*, 504 U.S. 71. *Foucha* is a case on which the majority places great emphasis, although it is also highly dissimilar. *Foucha* dealt with the question of whether an insanity acquittee had to remain involuntarily committed even if mentally healthy (although choosing to be antisocial), if he failed to prove he was not dangerous. It

is immediately apparent that *Foucha* is unlike the present case in the very areas that made the Louisiana statute in *Foucha* most offensive. First, under our Act there is no mechanism whereby a person can be confined while mentally healthy solely on the basis of supposed dangerousness. Second, under our Act the burden of proving an ailment of the mind and dangerousness remains always on the State, and always at the high burden of beyond a reasonable doubt.

The *Foucha* Court, without a majority opinion, found the Louisiana statute to be unconstitutional as violative of due process. The plurality opinion noted that due process required clear and convincing evidence of dangerousness and mental illness to support involuntary civil commitment. 504 U.S. at 80. Interestingly, the Court relied on *Jones*, which had determined that the mental illness required for involuntary civil commitment could be established by a finding of insanity at a criminal trial, even though Louisiana did not use the *Durham* test but rather the *M'Naghten* test. 504 U.S. at 80; La. Rev. Stat. § 14:14 (West 1986). This further illustrates that the Court recognized that "mental illness" was not a diagnostic term of art but rather a descriptive term which could be satisfied by various standards. Further evidence of the Court's flexible interpretation of mental illness is found in the fact that it alternatively referred to mental "illness," "disease," and "insanity" without expansion or qualification. 504 U.S. 81, 86. See *Jackson v. Indiana*, 406 U.S. 715, 737, 32 L. Ed. 2d 435, 92 S. Ct. 1845 (1972) (recognizing involuntary civil commitment can be based on several grounds); *State v. Post*, 197 Wis. 2d at 304-05.

The plurality opinion in *Foucha* found three specific constitutional shortcomings in Louisiana's law which are not present here. First, the Court found Foucha was entitled to a determination in a civil commitment hearing of his current mental illness and dangerousness. 504 U.S.

at 78. Hendricks is specifically provided with those procedural protections.

Second, after Foucha could no longer be held as an insanity acquittee, he was entitled to procedures to establish the grounds of his confinement, which were not provided. 504 U.S. at 79. There is no similar problem here.

Third, the Court held it was substantively unfair to confine a mentally healthy individual solely based on his predicted dangerousness. The State did not claim, nor did it have to prove under the Louisiana statute, that Foucha suffered any ailment of the mind. 504 U.S. at 80. In the present case, our Act requires the State to prove specifically defined type of mental ailment—a "mental abnormality." Hendricks' own testimony, as well as that of Dr. Befort, was admitted to support this burden.

Even if the plurality opinion in *Foucha* were applicable, it failed to garner the support of a majority of the Supreme Court as precedent for future cases. Justice O'Connor, in concurring, wrote: "I write separately, however, to emphasize that the Court's opinion addresses only the specific statutory scheme before us, which broadly permits indefinite confinement of sane insanity acquittees in psychiatric facilities. This case does not require us to pass judgment on more narrowly drawn laws . . . ." 504 U.S. at 86-87.

The majority opinion in our case rests on the erroneous conclusion that our Act is constitutionally infirm because it requires no showing of mental illness. It seems to base this conclusion on the absence of those two words. Yet it is not the incantation of "mental illness" that has constitutional significance, but the substance of the statute. Nor is mental illness an inflexible standard capable of precise meaning. As noted in *State v. Post*, 197 Wis. 2d at 304. "[T]he Supreme Court has declined to enunciate a single definition that must be used as the mental condition sufficient for involuntary mental commitments. The

Court has wisely left the job of creating statutory definitions to the legislators who draft state law."

The question is not whether Hendricks fits some clinical definition of mental illness, but whether he fit a legislative classification that is more than mere idiosyncratic behavior "within a range that is generally acceptable." *Addington*, 441 U.S. at 426-27. And, whether that definition strikes an appropriate balance between a compelling interest of the State and the liberty interest of the individual—that is, whether it passes strict scrutiny.

Moreover, it is important to note that this balancing test must consider the facts of Hendricks' case and not hypothetical situations that may or may not arise under the statute. The United States Supreme Court has not recognized an "overbreadth" doctrine outside the limited context of the First Amendment. *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987).

Our Act requires an ailment of the mind rising to either the level of a personality disorder or a "mental abnormality." The evidence in this case establishes that Hendricks did not have a personality disorder. The basis for commitment the State did use, that Hendricks has a mental abnormality, requires considerably more than evidence of idiosyncratic behavior which is within a range that is generally acceptable. It requires "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." K.S.A. 59-29a02(b).

Contrary to the majority opinion, this definition is not rendered meaningless by circularity. It clearly requires something more than a transitory inclination toward sexual violence generally. A person does not meet this standard for suffering from an ailment of the mind unless the person has both an ongoing mental pathology and that pathologoy

is so severe as to prompt sexually violent *behavior*. The nature of the mental abnormality required before confinement is available is further limited by the fact that the mental abnormality must be of a type that makes the person likely to engage in a specific and limited type of sexual violence—predatory acts—in a specific setting—outside a secure facility. See K.S.A. 59-29a02(a).

While it is true that the definition of the ailment of the mind justifying the civil commitment under the Act is not identical to that justifying civil commitment of other dangerous mentally ill persons, this presents no constitutional barrier as the United States Supreme Court has not imposed a specific definition of "mental illness" for constitutional purposes. The Kansas Legislature's decision to define "mentally ill person" in one context in K.S.A. 59-2902(h) does not impose a constitutional limitation on its ability to utilize a similar concept with fundamental differences for another purpose unless it violates constitutional guarantees of equal protection, which it does not, as we will later consider.

Nor is it critical that the Kansas Legislature defined "mental abnormality" as a classification that had not been explicitly recognized by the psychiatric community. The term "mental illness" itself is not defined in the DSM-IV. The DSM-IV is not in either design or fact a legal instrument, but merely a compendium of current thought among contemporary practitioners. The DSM-IV reflects only one perspective of the classification of mental disorders, and it violates no constitutional principle for the Kansas Legislature to select another.

> "[T]here has been little agreement on which disorders should be included and the optimal method for their organization. The many nomenclatures that have been developed during the past two millennia have differed in their relative emphasis on phenomenology, etiology, and course as defining features.

> Some systems have included only a handful of diagnostic categories; others have included thousands. Moreover, the various systems for categorizing mental disorders have differed with respect to whether their principle objective was for use in clinical, research, or statistical settings." DSM-IV, Historical Background, p. xvi.

The DSM-IV itself acknowledges the shortcomings of its classification scheme as a mechanism to identify all mental disorders which might be relevant in different contexts. It clearly acknowledges its limitations in stating:

> "Moreover, although this manual provides a classification of mental disorders, it must be admitted that no definition adequately specifies precise boundaries for the concept of 'mental disorder.' The concept of mental disorder, like many other concepts in medicine and science, lacks a consistent operational definition that covers all situations. . . . [D]ifferent situations call for different definitions." DSM-IV, Definition of Mental Disorder, p. xxi.

Thus, the fact that the legislature has chosen different definitions of mental ailments, and drawn the boundaries of what is a "mental abnormality" in accordance with its limited purposes, is not an indictment of the statutory scheme, but rather is to its credit. It reflects that the legislature has narrowly tailored its statute to include only those persons presenting the precise danger the statute seeks to abate. The DSM-IV defines classifications for purposes completely unrelated to protecting the public from sexually violent predators, and therefore it is of no moment that its classification of mental disorders differs from that adopted by the legislature.

There is no justification for linking constitutional standards to the shifting sands of academic thought reflected in the DSM-IV and its frequent revisions. "The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency." DSM-IV, Cautionary Statement, xxvii.

In light of the DSM-IV's purpose and design, it would be misguided to rely on it as a source of constitutional limitation on legislative power. The United States Supreme Court explained in *Jones*, 463 U.S. at 364 n.13:

> "We do not agree with the suggestion that Congress' power to legislate in this area depends on the research conducted by the psychiatric community. We have recognized repeatedly the 'uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment . . . .' [Citations omitted.] The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments."

Our treatment of the insanity defense in criminal cases presents a fitting analogy. Kansas follows the *M'Naghten* test: "Under the *M'Naghten* test for criminal insanity, a defendant is to be held not criminally responsible where he does not know the nature and quality of his act or where he does not know right from wrong with respect to that act." *State v. Baker*, 249 Kan. 431, Syl. ¶ 10,819 P.2d 1173 (1991). The DSM-IV does not contain a classification of insanity matching our legal definition. Nevertheless, we permit both lay and expert opinion on the question of criminal insanity. *State v. Harkness*, 252 Kan. 510, Syl. ¶ 11,847 P.2d 1191 (1992).

Consequently, the substantive due process analysis reduces to this: Has the State shown a compelling interest

to which its statutory scheme for involuntary commitment is narrowly tailored? As discussed above, the State interest in confining and treating sexual predators is the protection of the public from random violent sexual attack by persons known to the State to be likely to carry out such attacks. "[I]t is irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions." *Personal Restraint of Young*, 122 Wash. 2d 1, 26, 857 P.2d 989 (1993).

Is the Sexually Violent Predator Act sufficiently narrowly tailored to achieve the State's compelling interest? I would answer this question with a ringing "yes." The Act is narrowly tailored in a number of particulars. First, it does not apply to sex offenders generally, or even to all sex offenders suffering some ailment of the mind, but applies only to those persons with an ongoing mental condition rendering them likely to commit acts of sexual violence. Second, it does not apply to those susceptible to less restrictive treatment, but only to those who require secure confinement to prevent such violence. Third, to reduce the risk of erroneous detention it does not apply to all persons accused of sexually violent offenses, but only those previously charged or convicted. Fourth, it does not apply in the face of meager, or even clear and convincing evidence, but requires the State to prove beyond a reasonable doubt that a person qualifies for confinement. Fifth, consistent with its narrowly focused goals, it requires treatment outside the Department of Corrections. Sixth, it has adequate provisions for continuing reviews to ensure that only those persons representing a continuing danger are confined and treated. These are not all the reasons but are more than sufficient to require us to uphold the constitutionality of the Act.

For all of the reasons stated, I would hold that under established substantive due process analysis, the Act is narrowly tailored to serve a compelling State interest and therefore passes constitutional muster.

Although this dissent has answered the grounds for constitutional invalidity relied on by the majority, I write further, although not in great depth, about each additional issue raised by Hendricks which I would hold to be insufficient to require the reversal of his adjudication as a sexually violent predator.

Equal Protection

The "equal protection of the law" is guaranteed to all persons by both the Fourteenth Amendment to the United States Constitution and the Bill of Rights of the Kansas Constitution §§ 1 and 2.

Our decision on this issue is foretold by what we have said about the substantive due process issue herein. The difference between due process and equal protection is well established in *Peterson v. Garvey Elevators, Inc.* 252 Kan. 976, Syl. ¶ 1, 850 P.2d 893 (1993), where we state:

> "The difference between the constitutional concepts of due process and equal protection is that due process emphasizes fairness between the state and the individual dealing with the state, regardless of how other individuals in the same situation are treated, while equal protection emphasizes disparity in treatment by the state between classes of individuals whose situations arguably are indistinguishable."

Nevertheless, the test for determining the constitutionality of a statute under due process and equal protection weighs almost identical factors. *Clements v. United States Fidelity & Guaranty Co.*, 243 Kan. 124, 127, 753 P.2d 1274 (1988). When a statute is attacked as violative of equal protection, the initial inquiry becomes which standard of scrutiny to apply. I have already answered this question and explained why I would hold the Act survives strict scrutiny.

I would also hold that Hendricks' contention that similarly situated people are not treated similarly is totally

without merit. All members of the class of persons of which Hendricks is a part are subject to treatment identical to that which he has received. Hendricks argues that the Act applies only to people who commit sex offenses and not other violent crimes; that the Act applies only to those who meet the definition of a sexually violent predator and not people convicted of incest; and that the Act applies a different standard of ailment of the mind to confine sexually violent predators than is used to confine other dangerous mentally ill people and subjects them to materially different procedures. None of the groups Hendricks compares to sexually violent predators are similarly situated for the limited and narrow purpose of the Act.

The legislature has broad constitutional authority to adopt statutory programs to confine and treat people who might be dangerous to themselves or others and who suffer from some mental ailment, whether a mental abnormality, a personality disorder, or mental illness as statutorily defined. However, the legislature is under no duty to act to the fullest extent of its authority, and the Constitution is not offended merely because the exercise of legislative power may result in some inequality. See *Clements,* 243 Kan. at 128; *Manzanares v. Bell,* 214 Kan. 589, 612, 522 P.2d 1291 (1974).

The Act focuses on the narrow problem of mental abnormality and violent, predatory sex crimes. The testimony of Senator Vancrum, previously quoted, shows the target group was "a small number of habitual sex offenders, who because of their psychological makeup, pose an immediate danger to the public."

Equal protection of the law does not require the State to choose between attacking every aspect of a public danger or not attacking any part of the danger at all. As we said in *Manzanares*:

> " '[T]he legislative authority, acting within its proper field, is not bound to extend its regulations to all

> cases it might possibly reach. The legislature is "free to recognize degrees of harm and may confine its restrictions to those classes of cases where the need is deemed to be clearest." If "the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." ' " *Manzanares,* 214 Kan. at 615 (quoting *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578 [1937]).

A statute does not violate equal protection just because it does not go as far as it might have gone. *State ex rel. Schneider v. Liggett,* 223 Kan. at 619.

The Act does not violate equal protection principles for the same reason it does not violate substantive due process—it is narorwly tailored to deal with a compelling State interest.

Civil or Punitive Nature of Act

Hendricks appeals the trial court's finding that the Act is civil in nature and remedial, contending it is criminal and punitive. If the Act is criminal, Hendricks contends it is unconstitutional because it violates the constitutional prohibitions against double jeopardy and ex post facto laws. Since the arguments as to the second contention depend on whether the Act is civil or criminal in nature that must be first considered.

The Kansas Legislature's intention to make the Act a civil statute is clear. The preamble of the Act, which has been previously quoted in its entirety, concludes by stating: "[T]herefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature." K.S.A. 59-29a01.

A person committed under the Act is placed in the custody of the Secretary of SRS, not the Department of

Corrections. K.S.A. 59-29a07(a). The provisions for commitment are similar to those for involuntary civil commitment under K.S.A. 59-2901 *et seq.* The classification established by the legislature will not be ignored by the court absent the *clearest proof* that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention that the proceeding be civil. *United States v. Ward*, 448 U.S. 242, 249, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980).

The United States Supreme Court in *Ward* held that we first determine whether the legislature has applied a "civil" label to the statute and then whether the statutory scheme was so punitive either in purpose or effect as to negate that label. 448 U.S. at 248-49.

We have recently considered how a court determines whether a statutory enactment is truly remedial or punitive in character. A sanction which protects the public from harm is remedial in nature. *State v. Mertz*, 258 Kan. 745, 754, 907 P.2d 847 (1995). "Legislation which is regarded as remedial in its nature includes statutes having for their purpose the promotion of justice and the advancement of public welfare and beneficial public objects, such as the protection of health, morals, and safety of society, or of the public generally." *Mertz*, 258 Kan. 745, Syl. ¶ 9.

There is no single feature which determines whether a statute is civil or criminal. Instead the court takes a commonsense, broad view, considering several factors:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears

> excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963).

In *Allen v. Illinois*, 478 U.S. 364, 368-74, 92 L. Ed. 2d 296, 106 S. Ct. 2988 (1986), the United States Supreme Court held that the Illinois Sexually Dangerous Persons Act, which provided for the confinement and treatment of sexually dangerous persons, was civil in character such that a person subject to it could not claim the protection of the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution. The Court found that by mandating care and treatment and providing for release if the person was no longer dangerous,

> "the State has disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released after the briefest time in confinement. The Act thus does not appear to promote either of 'the traditional aims of punishment—retribution and deterrence.'" 478 U.S. at 370.

Like the Illinois Act, the commitment under our Act for care and treatment may continue only "until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." K.S.A. 59-29a07(a).

Hendricks argues the Act is criminal in nature because it requires a showing of scienter, which he supports by claiming the Act applies to those convicted of a sexually violent offense. See K.S.A. 59-29a01. Inconsistent with this argument is the fact the Act also applies to those *charged* with sexually violent offenses. In such cases, no

finding of criminal intent would accompany civil commitment. Additionally, the United States Supreme Court rejected a similar argument in *Allen*, 478 U.S. at 370:

> "[Petitioner] first notes that the State cannot file a sexually-dangerous-person petition unless it has already brought criminal charges against the person in question. . . . In addition, the State must prove that the person it seeks to commit perpetrated 'at least one act of or attempt at sexual assault or sexual molestation.' 107 Ill. 2d, at 105, 481 N. E. 2d, at 697. To petitioner, these factors serve to distinguish the Act from other civil commitments, which typically are not tied to any criminal charge and which the petitioner apparently concedes are not 'criminal' under the Self-Incrimination Clause. . . . We disagree. That the State has chosen not to apply the Act to the larger class of mentally ill persons who might be found sexually dangerous does not somehow transform a civil proceeding into a criminal one."

The existence of previous or pending criminal convictions or charges serves only the limited purpose of identifying the group of individuals within which sexually violent predators might be found.

The testimony of individuals before the Senate and House Judiciary Committees that the Act was geared toward continued incarceration is repudiated by the stated legislative purpose, the civil nature of the commitment, and the specific requirement in K.S.A. 59-29a09 that the detention of persons "shall conform to constitutional requirements for care and treatment."

I would reject Hendricks' contention that the practical effect of the Act is indeterminate incarceration and the statement of the majority that treatment for sexually violent predators is all but nonexistent. The existence or extent of the specific care and treatment Hendricks has

or will receive is not at issue here. It is clear that treatment is statutorily and constitutionally required. Further, the perspective of the committed individual is not what is relevant: "In determining if a civil proceeding has a retributive, deterrent, or remedial purpose, a court must use common sense. The court makes this determination from the objective viewpoint and not from the subjective viewpoint of the defendant." *State v. Mertz*, 258 Kan. 745, Syl. ¶ 6. The mere fact of commitment "does not itself trigger the entire range of criminal procedural protections." *Allen*, 478 U.S. at 372.

The legislature's purpose was the protection of society from those rendered sexually dangerous by a mental ailment and the treatment of such people. Together, these are permissible goals of a civil commitment scheme and do not convert the Act into a criminal statute. See *Allen*, 478 U.S. at 373. I would hold the Act to be civil in nature; thus, it should be evaluated by the standards applicable to such statutes.

Double Jeopardy

A claim of double jeopardy generally applies only to criminal matters, and our finding that the Act is civil in nature diminishes any basis for this claim. Irrespective of our earlier holding, the claim must fail since none of the types of constitutionally guaranteed double jeopardy protection are available to assist Hendricks. Justice Abbott explained in *Mertz*:

> "The Fifth Amendment Double Jeopardy Clause of the United States Constitution states: '[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.' The double jeopardy guaranty is enforceable against the states through the Fourteenth Amendment. *North Carolina v. Pearce*, 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969). Kansas also enforces an analogous

double jeopardy clause in Section 10 of the Kansas Constitution Bill of Rights. It states: 'No person shall . . . be twice put in jeopardy for the same offense.' The double jeopardy protection guaranteed in the Kansas Constitution Bill of Rights is equivalent to the protection guaranteed in the United States Constitution. See *State v. Cady*, 254 Kan. 393, 396-97, 867 P.2d 270 (1994). The double jeopardy clause provides three different types of protection for a person charged with a crime. Double jeopardy protection shields an accused from '(1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.' 254 Kan. 396 (citing *Brown v. Ohio*, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 [1977])." 258 Kan. at 749.

The first type of protection has no application here because Hendricks was not acquitted of any offense. The second type of protection would apply only if the civil commitment proceeding were a prosecution for the same offenses of which Hendricks was convicted. As noted above, the Act is not concerned with Hendricks' past actions except to the extent they evidence his current dangerousness and mental ailment. Hendricks acknowledges that the second type of protection is implicated only if the Act is criminal in character rather than civil.

The third type of double jeopardy protection, relating to multiple punishments for the same offense, can be implicated even in a proceeding labeled as civil. *United States v. Halper*, 490 U.S. 435, 447-48, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989). Thus, a civil sanction disproportionate to the harm actually caused may qualify as punishment for double jeopardy purposes. 490 U.S. at 448. "Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.

These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence." 490 U.S. at 448-49. "[A] civil sanction is violative of the Double Jeopardy Clause only if it 'may not fairly be characterized as remedial, but only as a deterrent or retribution.' *Halper*, 490 U.S. at 448-49." *State v. Carpenter*, 197 Wis. 2d 252, 264, 541 N.W.2d 105 (1995).

As noted above, the legislative purpose of the Act is public safety and treatment of those committed, not retribution or deterrence. Since it is remedial in nature and seeks neither punishment nor retribution, it does not constitute a double jeopardy violation.

Ex post facto

Hendricks' contention that the Act is unconstitutional as an ex post facto law is without any merit.

An ex post facto law punishes as a crime an act previously committed that was innocent when done, increases the punishment for a crime after its commission, or deprives an accused of any defense which was available by law at the time the act was committed. *Collins v. Youngblood*, 497 U.S. 37, 42, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990). Since the Act, as a civil statute, neither criminalizes conduct legal before its passage nor imposes punishment for a crime, it does not violate the Ex Post Facto Clause. Its concern is the *current* mental condition of the person subject to commitment and his or her *present* dangerousness, not any past behavior except as relevant to show current condition.

Procedural Due Process

Hendricks' argument that the Act violates procedural due process must also fail. Procedural due process guarantees apply only to liberty and property interests encompassed by the Fourteenth Amendment. *Jacobs, Visconsi & Jacobs v. City of Lawrence*, 927 F.2d 1111, 1115

(10th Cir. 1991). The fundamental requirement of due process is a fair trial in a fair tribunal. *State v. Green*, 245 Kan. 398, 404, 781 P.2d 678, *cert. denied* 114 S. Ct. 1848 (1989). The concept of due process is flexible and does not require the same kinds of procedural safeguards in all situations. *In re Marriage of Soden*, 251 Kan. 225, Syl. ¶ 6, 834 P.2d 358, *cert. denied* 121 L. Ed. 2d 540 (1992). The procedures that must be afforded an individual depend on the nature of the loss the individual faces and whether the government's interest in a more abbreviated procedure outweighs the individual's interest. *In re Cooper*, 230 Kan. 57, Syl. ¶ 3, 631 P.2d 632 (1981).

The outline of the Act at the beginning of this dissent shows Hendricks is provided with a panoply of procedural rights. "The essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case." *Crane v. Mitchell County U.S.D. No. 273*, 232 Kan. 51, Syl. ¶ 1, 652 P.2d 205 (1982).

The Act clearly provides all the necessary basic protections, including appointed counsel, a probable cause hearing, appointment of qualified experts or professional persons, a jury trial with unanimous decision, appeals, annual examinations, discharge petitions, hearings, and the strictest possible burden of proof on the State.

Hendricks' argument that the Act denies him the right to remain silent is meritless, as the United States Supreme Court has clearly held that the protection against self-incrimination has no application in the civil commitment of sexually violent persons. Such protections come neither from the Fifth Amendment nor the Due Process Clause. See *Allen*, 478 U.S. at 368-74.

Hendricks has failed to overcome the presumption of the constitutionality of the Act on the grounds of double jeopardy, ex post facto, and procedural due process

largely because the Act is not punitive but remedial, not criminal but civil.

Hendricks' 1984 plea agreement

In exchange for his 1984 plea, Hendricks recounts that the State agreed to dismiss one of three counts of indecent liberties, not seek application of the Habitual Criminal Act, and recommend a prison sentence of 5 to 20 years on the remaining two counts, to be run concurrently.

Hendricks contends that he had served the required time to be released and the institution of proceedings to commit him for care and treatment violated his 1984 plea agreement.

Hendricks relies on *State v. Wills*, 244 Kan. 62, 765 P.2d 1114 (1988). In *Wills*, this court held that the State's unqualified agreement to make a specific sentencing recommendation was binding not only at the original sentencing hearing, but also at a hearing on a motion to modify the sentence.

Hendricks' argument is unpersuasive. First, Hendricks' 1984 conviction was not the basis for his involuntary commitment. His involuntary commitment was based solely on his mental ailment and present dangerousness. His 1984 conviction served only to identify him as a member of the pool of people potentially subject to the Act. Second, *Wills* stands for the limited proposition that an unqualified agreement as to the scope of *punishment* for an offense remains binding on the State after the original sentencing. Hendricks' present confinement is not punishment for any offense but merely civil commitment based on his mental condition. Civil commitment following the service of the sentence is collateral to the plea and independent of the criminal case. See *George v. Black*, 732 F.2d 108, 110-11 (8th Cir. 1984). Third, under the Act, Hendricks' conviction of, and thus his guilty plea to sexually violent offenses is immaterial.

A person who is charged with such offenses is identified as within the pool to whom the Act might apply. The State did not violate the plea agreement.

Statutory Vagueness or Overbreadth

Hendricks' claim that the Act is violative of due process because it is too vague and overbroad in definition, in procedure, in purpose, and in application must also fail, primarily because the language of the Act, as summarized earlier, is clear.

We remain duty bound to avoid a vague construction of the Act if reasonably possible. *Boatwright v. Kansas Racing Comm'n*, 251 Kan. 240, Syl. ¶ 1, 834 P.2d 368 (1992). Where the statute at issue does not impose criminal penalties, a commonsense determination of fairness is the standard for determining vagueness. See *Boatright*, 251 Kan. 240, Syl. ¶ 3. We need not again detail all the provisions of the Act previously referred to herein to answer Hendricks' claim. The Act is comprehensive, understandable, capable of application, and sufficiently clear and definite to withstand a vagueness challenge.

Scope of Expert Testimony

Hendricks' argument that the trial court's limitation of his expert's testimony about a few technical details of certain academic studies amounts to reversible error is equally unconvincing.

To prevail on appeal, Hendricks must establish that the trial court abused its discretion. See *State v. Friberg*, 252 Kan. 141, 147, 843 P.2d 218 (1992). Judicial discretion is abused only where no reasonable person would take the view of the trial court. *State v. Warden*, 257 Kan. 94, 116, 891 P.2d 1074 (1995).

From a review of the record it is apparent the trial court permitted Hendricks' expert to testify about all relevant conclusions within his field of expertise. Reasonable people could agree the excluded details could confuse the jury without materially advancing Hendricks' position. Additionally, it does not appear that Hendricks attempted to offer the disputed evidence to the jury or that a proper proffer was made to preserve this issue for consideration on appeal.

Dr. Logan is an experienced psychiatrist who opined that based on numerous studies, mental health professionals erroneously predicted future unlawful behavior two out of three times and treatment has little effect on the recidivism rate for pedophiles. The evidence directly countered Dr. Befort's opinion and Hendricks' admissions, and it was up to the jury to consider its weight.

Sufficiency of Evidence

Because the State's burden under the Act requires proof beyond a reasonable doubt, our standard of review is whether, after viewing all the evidence, viewed in the light most favorable to the State, we are convinced that a rational factfinder could have found Hendricks was a sexually violent predator beyond a reasonable doubt.

Dr. Befort's expert testimony, Hendricks' own testimony that he could not guarantee he would stop his sexual attacks on children, Hendricks' entire life history, and the testimony of three of his victims, including two stepchildren, are clearly sufficient to support the jury's unanimous verdict.

Conclusion

For all of the reasons hereinbefore set forth, I dissent from this court's opinion and would hold that the Kansas Sexually Violent Predator Act is constitutional. The trial court should be affirmed.

McFARLAND, C.J., and SIX, J., join in the foregoing dissenting opinion.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF KANSAS

No. 73,039

IN THE MATTER OF THE CARE AND TREATMENT
OF LEROY HENDRICKS,
Appellant.

ORDER

The motion of the appellee, State of Kansas, for this court to stay the issuance of the mandate in the above-captioned motion is granted in part and denied in part.

A stay of the issuance of the mandate pending a determination of the case by the United States Supreme Court is denied.

A temporary stay of 30 days for the State to request that the Circuit Justice for the 10th Circuit issue a stay pending the determination of the case by the United States Supreme Court is granted.

The Clerk of the Appellate Courts of Kansas is directed to issue the mandate to the district court 30 days from the date of this order.

By order of the court this 22nd day of March, 1996.

FOR THE COURT

/s/ Donald L. Allegrucci
DONALD L. ALLEGRUCCI
Justice

APPENDIX C

The Kansas Sexually Violent Predator Act, Kan. Stat. Ann. 59-29a01 *et seq.*, currently provides as follows in its entirety. The Act was amended in limited respects in April 1995, after the trial court proceedings in this case. Substantive language added to the Act in the April 1995 amendments is indicated in italics below. The only other changes effected by the amendments relate to substantively insignificant matters, principally substitution of "attorney general" for "prosecuting attorney" in a number of places and some lengthening of the number of days for certain actions to be taken.

59-29a01. Commitment of sexually violent predators; legislative findings.

The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under K.S.A. 59-2901 et seq. and amendments thereto, sexually violent predators generally have antisocial personality features which are unamendable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is

poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, therefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature.

59-29a02. Same; definitions

As used in this act:

(a) "Sexually violent predator" means any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence, *if not confined in a secure facility.*

(b) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

(c) "Predatory" means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.

(d) "Sexually motivated" means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification.

(e) "Sexually violent offense" means:

(1) Rape as defined in K.S.A. 21-3502 and amendments thereto;

(2) indecent liberties with a child as defined in K.S.A. 21-3503 and amendments thereto;

(3) aggravated indecent liberties with a child as defined in K.S.A. 21-3504 and amendments thereto;

(4) criminal sodomy as defined in subsection (a)(2) and (a)(3) of K.S.A. 21-3505 and amendments thereto;

(5) aggravated criminal sodomy as defined in K.S.A. 21-3506 and amendments thereto;

(6) indecent solicitation of a child as defined in K.S.A. 21-3510 and amendments thereto;

(7) aggravated indecent solicitation of a child as defined in K.S.A. 21-2511 and amendments thereto;

(8) sexual exploitation of a child as defined in K.S.A. 21-3516 and amendments thereto;

(9) aggravated sexual battery as defined in K.S.A. 21-3518 and amendments thereto;

(10) any conviction for a felony offense in effect at any time prior to the effective date of this act, that is comparable to a sexually violent offense as defined in subparagraphs (1) through (9) or any federal or other state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this section;

(11) an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 and 21-3303, and amendments thereto, of a sexually violent offense as defined in this subsection; or

(12) any act which either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this act, has been determined beyond a reasonable doubt to have been sexually motivated.

(f) "Agency with jurisdiction" means that agency which releases upon lawful order or authority a person serving a sentence or term of confinement and includes

the department of corrections, the department of social and rehabilitation services and the Kansas parole board.

59-29a03. Same; notice of release of sexually violent predator by agency with jurisdiction to attorney general and multidisciplinary team, time, contents; immunity from liability; establishing a multidisciplinary team; appointment of a prosecutor's review committee; assessment of person.

(a) When it appears that a person may meet the criteria of a sexually violent predator as defined in K.S.A. 59-29a02 and amendments thereto, the agency with jurisdiction shall give written notice of such to the attorney general and the multidisciplinary team established in subsection (d), 90 days prior to:

(1) The anticipated release from total confinement of a person who has been convicted of a sexually violent offense, *except that in the case of persons who are returned to prison for no more than 90 days as a result of revocation of postrelease supervision, written notice shall be given as soon as practicable following the person's readmission to prison;*

(2) release of a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial pursuant to K.S.A. 22-3305 and amendments thereto;

(3) release of a person who has been found not guilty by reason of insanity of a sexually violent offense pursuant to K.S.A. 22-3428 and amendments thereto; or

(4) release of a person who has been found not guilty of a sexually violent offense pursuant to K.S.A. 22-3428, and amendments thereto, and the jury who returned the verdict of not guilty answers in the affirmative to the special question asked pursuant to K.S.A. 22-3221.

(b) The agency with jurisdiction shall inform the attorney general *and the multidisciplinary team established in subsection (d)* of the following:

(1) The person's name, identifying factors, anticipated future residence and offense history; and

(2) documentation of institutional adjustment and any treatment received.

(c) The agency with jurisdiction, its employees, officials, *members of the multidisciplinary team established in subsection (d), members of the prosecutor's review committee appointed as provided in subsection* (e) and individuals contracting, appointed or volunteering to perform services hereunder shall be immune from liability for any good-faith conduct under this section.

(d) *The secretary of corrections shall establish a multidisciplinary team which may include individuals from other state agencies to review available records of each person referred to such team pursuant to subsection (a). The team, within 30 days of receiving notice, shall assess whether or not the person meets the definition of a sexually violent predator, as established in K.S.A. 59-29a02 and amendments thereto. The team shall notify the attorney general of its assessment.*

(e) *The attorney general shall appoint a prosecutor's review committee to review the records of each person referred to the attorney general pursuant to subsection (a). The prosecutor's review committee shall assist the attorney general in the determination of whether or not the person meets the definition of a sexually violent predator. The assessment of the multidisciplinary team shall be made available to the attorney general and the prosecutor's review committee.*

59-29a04. Same; petition, time, contents.

When it appears that the person presently confined may be a sexually violent predator *and the prosecutor's review committee appointed as provided in subsection (e) of K.S.A. 59-29a03 and amendments thereto has determined that the person meets the definition of a sexually violent predator*, the attorney general may file a petition, within 75 days of the date the attorney general received the written notice by the agency of jurisdiction as provided in subsection (a) of K.S.A. 59-29a03 and amendments thereto, alleging that the person is a sexually violent predator and stating sufficient facts to support such allegation.

59-29a05. Same; determination of probable cause, hearing; evaluation; person taken into custody.

(a) Upon filing of a petition under K.S.A. 59-29a04, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made, the judge shall direct that person be taken into custody.

(b) *Within 72 hours after a person is taken into custody pursuant to subsection (a), such person shall be provided with notice of, and an opportunity to appear in person at, a hearing to contest probable cause as to whether the detained person is a sexually violent predator. At this hearing the court shall: (1) Verify the detainer's identity; and (2) determine whether probable cause exists to believe that the person is a sexually violent predator. The state may rely upon the petition and supplement the petition with additional documentary evidence or live testimony.*

(c) *At the probable cause hearing as provided in subsection (b), the detained person shall have the following rights in addition to the rights previously specified: (1) To be represented by counsel; (2) to present evidence on such person's behalf; (3) to cross-examine witnesses who testify*

against such person; and (4) to view and copy all petitions and reports in the court file.

(d) *If the probable cause determination is made, the court shall direct that* the person be transferred to an appropriate *secure* facility, *including*, but not limited to, a county jail, for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination.

59-29a06. Same; trial; counsel and experts; indigent persons; jury.

Within 60 days after the completion of any hearing held pursuant to K.S.A. 59-29a05 and amendments thereto, the court shall conduct a trial to determine whether the person is a sexually violent predator. *The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced.* At all stages of the proceedings under this act, any person subject to this act shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist such person. Whenever any person is subjected to an examination under this act, such person may retain experts or professional persons to perform an examination of such person's behalf. When the person wishes to be examined by a qualified expert or professional person of such person's own choice, such examiner shall be permitted to have reasonable access to the person for the purpose of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court, upon the person's request, shall *determine whether the services are necessary and reasonable compensation for such services. If the court determines that the services are necessary and expert or professional person's requested compensation*

for such services is reasonable, the court shall assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf. *The court shall approve payment for such services upon the filing of a certified claim for compensation supported by a written statement specifying the time expended, services rendered, expenses incurred on behalf of the person and compensation received in the same case or for the same services from any other source.* The person, the attorney general, or the judge shall have the right to demand that the trial be before a jury. Such demand for the trial to be before a jury shall be filed, in writing, at least four days prior to trial. Number and selection of jurors shall be determined as provided in K.S.A. 22-3403, and amendments thereto. If no demand is made, the trial shall be before the court.

59-29a07. Same; determination; commitment procedure; interagency agreements; mistrials.

(a) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If such determination that the person is a sexually violent predator is made by a jury, such determination shall be by unanimous verdict of such jury. Such determination may be appealed. If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the secretary of social and rehabilitation services for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. Such control, care and treatment shall be provided at a facility operated by the department of social and rehabilitation services. At all times, persons committed for control, care and treatment by the department of social and rehabilitation services pursuant to this act shall be kept in a secure facility and such persons shall be segregated at all times from any other patient under the supervision of the secretary of social and rehabilitation services and commencing June 1, 1995, such persons committed pursuant to this act shall be kept in a facility or building separate from any other patient under the supervision of the secretary. *The department of social and rehabilitation services is authorized to enter into an interagency agreement with the department of corrections for the confinement of such persons. Such persons who are in the confinement of the secretary of corrections pursuant to an interagency agreement shall be housed and managed separately from offenders in the custody of the secretary of corrections, and except for occasional instances of supervised incidental contact, shall be segregated from such offenders.* If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct the person's release. *Upon a mistrial, the court shall direct that the person be held at an appropriate secure facility, including, but not limited to, a county jail, until another trial is conducted. Any subsequent trial following a mistrial shall be held within 90 days of the previous trial, unless such subsequent trial is continued as provided in K.S.A. 59-29a06 and amendments thereto.*

(b) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to be released pursuant to K.S.A. 22-3305 and amendments thereto, and such person's commitment is sought pursuant to subsection (a), the court shall first hear evidence and determine whether the person did commit the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence

or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on such person's own behalf, the extent to which the evidence could be reconstructed without the assistance of the person and the strength of the prosecution's case. If after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, the court shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

59-29a08. Same; annual examinations; discharge petitions by persons committed under this act over the secretary's objection at time of annual examination, procedure.

Each person committed under this act shall have a current examination of the person's mental condition made once every year. The person may retain, or if the person is indigent and so requests the court may appoint a qualified professional person to examine such person, and such expert or professional person shall have access to all records concerning the person. The yearly report shall be provided to the court that committed the person under this act. The court shall conduct an annual review of the status of the committed person. Nothing contained in this act shall prohibit the person from otherwise petitioning the court for discharge at this hearing. The secretary of the department of social and rehabilitation services shall provide the committed person with an annual written notice of the person's right to petition the court for release over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall forward the notice and waiver form to the court with the annual report. The committed person shall have a right to have an attorney represent the person

at the hearing but the person is not entitled to be present at the hearing. If the court at the hearing determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged, then the court shall set a hearing on the issue. At the hearing, the committed person shall be entitled to be present and entitled to the benefit of all constitutional protections that were afforded the person at the initial commitment proceeding. The attorney general shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to have experts evaluate the person on the person's behalf and the court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and if released is likely to engage in acts of sexual violence.

59-29a09. Detention and commitment to conform to constitutional requirements.

The involuntary detention or commitment of persons under this act shall conform to constitutional requirements for care and treatment.

59-29a10. Petition for release; procedure.

If the secretary of the department of social and rehabilitation services determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released, the secretary shall authorize the person to petition the court for release. The petition shall be served upon the court and the attorney general.

The court, upon receipt of the petition for release, shall order a hearing within 30 days. The attorney general, shall represent the state, and shall have the right to have the petitioner examined by an expert or professional person of such attorney's choice. The hearing shall be before a jury if demanded by either the petitioner or the attorney general. The burden of proof shall be upon the attorney general to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and that if discharged is likely to commit predatory acts of sexual violence.

59-29a11. Same; subsequent discharge petitions, limitations.

Nothing in this act shall prohibit a person from filing a petition for discharge pursuant to this act. However, if a person has previously filed a petition for discharge without the secretary of the department of social and rehabilitation services approval and the court determined either upon review of the petition or following a hearing, that the petitioner's petition was frivolous or that the petitioner's condition had not so changed that the person was safe to be at large, then the court shall deny the subsequent petition unless the petition contains facts upon which a court could find the condition of the petitioner had so changed that a hearing was warranted. Upon receipt of a first or subsequent petition from committed persons without the secretary's approval, the court shall endeavor whenever possible to review the petition and determining if the petition is based upon frivolous grounds and if so shall deny the petition without a hearing.

APPENDIX D

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

Case No. 140294

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

CHRISTOPHER HUBBART,
Defendant.

STATEMENT OF DECISION

Launching a multi-pronged attack on the constitutionality of Welfare and Institutions Section 6600 *et sec.* (hereinafter the SVP law or statute), Christopher Hubbart requests the court to sustain a demurrer to the People's petition to involuntarily commit him as a sexually violent offender. Hubbart claims the statute is facially unconstitutional as it runs afoul of ex posto facto and double jeopardy protections and it denies him of both equal protection and due process of law.[1]

Ex Post Facto Analysis

Both the United States and California Constitutions forbid retroactive application of penal statutes. To run

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[1] This decision is prepared primarily for the benefit of counsel, who are familiar with the applicable case law. The court has reviewed, with interest, the case of *In re Young*, 122 Wash.2d 1, 857 P.2d 989 (1993), in the belief that a decision of the Washington Supreme Court is entitled to the same respect and consideration as a decision of a federal district court.

afoul of the *ex post facto* clauses, the law must be a criminal or penal law that applies to events occurring before the law's effective date and the law must substantially disadvantage the offender. A court should consider both the law's purpose and effect in determining whether there is an *ex post facto* violation.

The stated purpose of the SVP law is to identify, commit and treat eligible individuals for mental disorders only as long as those disorders persist to such a degree as it is likely the individual will engage in sexually violent criminal behavior. There is nothing in the law itself that manifests some purpose other than the asserted interest in treatment. Such an interest has been traditionally regarded as civil in nature rather than penal. While the law may have the effect of incidentally restraining Mr. Hubbart's interest in liberty, that fact alone does not convert the law in a criminal or penal statute, retroactively inflicting punishment. The statute, being civil in purpose and effect, does not offend the *ex post facto* clauses.

Equal Protection Claim

Mr. Hubbart claims the statute violates his right to equal protection of the laws as he is being treated differently from others who suffer from mental disorders. Other statutes that permit involuntary confinement for treatment purposes require proof of an individual's present dangerousness; the SVP law requires proof that the individual is likely to reoffend. While the English language as a vehicle for the communication of ideas or concepts does have limits, it is an affront to reason to suggest that a person who, as a result of a mental disorder, is likely to commit violent sexual offenses is not presently dangerous. The standard set forth in the SVP law is really no different than that set forth in other statutes. There is, accordingly, no equal protection violation.

Due Process Considerations

It is asserted that the statutory definition of a mental disorder is so broad as to sanction the commitment of an individual on proof the individual suffers from no more than an antisocial personality disorder. The court will not debate the forensic merits of an abstract case. In *this* case, two elementary principles of law are involved. First, a person must show the statute in question violates that person's constitutional rights, not the rights of someone else. Second, a demurrer admits the allegations of the petition to be true.[2] In this case, the petition and supporting documents allege that Mr. Hubbart suffers from a mental disorder, specifically, paraphilia, in addition to personality disorders. If this be true, as the demurrer admits, Mr. Hubbart suffers from a specific recognized mental disorder over and above an antisocial personality. As applied to him, the statutory definition of a mental disorder is clearly constitutional.

It is also alleged that the standard of proof set forth in the SVP law falls below the constitutional minimum. The statute itself requires no less than proof beyond reasonable doubt, the highest standard of proof known in law. That evidence of prior criminal acts may be presented to the fact-finder, does not dilute this burden of proof. The SVP law specifically limits the fact-finder's consideration of that evidence to the requirements of due process.

It is finally contended that the SVP law does not ensure meaningful treatment. This claim contradicts specific statutory directives which state treatment *shall* be consistent with current institutional standards for the treat-

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[2] These principles of law also dispose of the contention that some predicate offenses set forth in the SVP law do not have force, violence, etc., as a component element. In *this* case, both predicate offenses alleged required proof of and a finding that force was used. The necessity to relitigate the issue of force will not arise in this case.

ment of sex offenders and shall be based on a structured treatment protocol developed by the responsible authority. The content of this protocol is presently unknown to the court, but the court will presume that public officials charged with a statutory responsibility will adequately perform their mandated duty, absent evidence to the contrary.

Double Jeopardy

Double jeopardy limitations forbid double punishment for a single act or omission. Under the SVP law, an individual is not being punished anew for prior offenses. On the contrary, he is being incapacitated and treated for a currently existing mental disorder that is likely to give rise to new sexually assaultive conduct. The state has demonstrated a compelling interest here and has responded appropriately. Penalty and punishment are not in issue.

In conclusion, the court believes the SVP law to be constitutional, insofar as it is being applied in Mr. Hubbart's case. The demurrer is, accordingly, respectfully overruled.

DATED: February 9, 1996

ROBERT M. FOLEY
Judge of the Superior Court

No. 95-1649

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

State of Kansas, *Petitioner*,

v.

Leroy Hendricks, *Respondent.*

On Petition For Writ Of Certiorari
To The Kansas Supreme Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Kansas Sexually Violent Predator Act, Kan. Stat. Ann. § 59-29a01 et seq. -- which provides for the civil commitment and long-term care and treatment of those who are found beyond a reasonable doubt both (1) to be suffering form a mental abnormality that has resulted in the commission of a sexually violent offense and (2) to present a continuing danger to society through a likelihood of repeating such offenses -- violate substantive due process principles?

2. What level of constitutional scrutiny applies to a claim that civil confinement of a sexually violent predator for care and treatment deprives him of a liberty interest in violation of substantive due process principles?

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No. 95-1649

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

State of Kansas, *Petitioner*,

v.

Leroy Hendricks, *Respondent.*

Brief in Opposition

The Respondent, Leroy Hendricks, respectfully requests that the Court deny the petition for a writ of certiorari filed by the State of Kansas seeking review of the March 1, 1996 decision of the Kansas Supreme Court holding that the Kansas Sexually Violent Predator Act violates substantive due process principles. The case will be reported at 912 P.2d 129.

STATEMENT OF THE CASE

The 1984 Plea Agreement

In 1984, Respondent Leroy Hendricks was charged with three counts of indecent liberties with a child, arising out an incident in which he allegedly fondled three thirteen year old boys who came into the electronics store in which he worked. Each charge carried a possible penalty

of five to twenty years imprisonment. R. App. 10a,[1] K.S.A. 21-3503, 21-4501(c). In addition, because Respondent had previously been convicted of criminal offenses, these sentences could have been tripled under the State's habitual offender law. R. App. 10a, K.S.A. 21-4504(b). Respondent was thus subject to a possible maximum sentence of 45 to 180 years.

The State chose to seek neither the maximum sentence nor to enhance the sentence. Instead, it entered into a plea bargain with the Respondent in which it agreed to dismiss one of the counts, not seek an enhanced sentence under the habitual criminal offender act and to recommend a controlling sentence of five to twenty years, to be served concurrently, on Respondent's guilty pleas.[2] Respondent entered a plea based upon the bargain, and the court imposed the agreed-upon sentence. Pet. App. 16a, 17a.[3] The result was that Respondent was eligible for parole in three years and would be required to be released, if he earned all possible good time credits, in ten years. R. App. 13a, 14a. K.S.A. 22-3717(a)(c)(1), 22-3718.

In addition to agreeing to this bargain, the State made no allegation at the time that Respondent was suffering from an mental illness, or indeed, from any illness needing psychological treatment, and it failed to move either for civil commitment or to seek Respondent's commitment, as a part of his criminal sentence, to a state psychiatric hospital "for psychiatric care and treatment."[4]

Respondent served his sentence without incident. He did not present any behavioral problems. He engaged in no predatory acts, sexual or otherwise. He earned all of his good time possible, and he was scheduled to be released from confinement, at the expiration of his

[1] R. App. Refers to the Respondent's appendix attached to this brief in opposition.
[2] There is no explanation in the record for the State's reasoning in making such an agreement with the Respondent.
[3] Pet. App. Refers to the appendix attached to the State's Petition.

sentence, on September 11, 1994. (R. Vol. 8 pp. 12-25)[5] Respondent would have been 60 years old sixteen days after the date of his projected release. (R. Vol. 14 p. 204)

THE KANSAS SEXUALLY VIOLENT PREDATOR ACT

In the summer prior to Respondent's release, the Kansas Legislature passed a number of measures in an effort to lengthen the terms of individuals convicted of sexual offenses. The legislature doubled the penalties for certain violent offenders. 1994 Kan. Sess. Laws, Ch. 252. In addition, the legislature passed a statute permitting a sentence departure for a criminal defendant designated as a "predatory sex offender." The enhancement provision defines predator sex offender as an individual who has been convicted of a crime of extreme sexual violence and who "suffers from a mental condition or personality disorder which makes the offender likely to engage in additional acts" constituting sexual crimes. R. App. 15a, K.S.A. 21-4716.[6]

While these acts permitted additional incarceration of individuals who might commit crimes in the future, they could not deal with public concern over individuals already incarcerated for sex offenses who might be released. The legislature *was* urged to extend the period of incarceration for such individuals, and it responded by passing the Sexually Violent Predator Act. Pet. App. 25a Modeled after a similar statute passed in Washington State in 1992,

[4] Kansas statutes also provide for mental evaluation and treatment, including commitment to a state psychiatric hospital, for a period not to exceed the maximum term of imprisonment allowed. App 12a,13a, K.S.A. 22-3429, 22-3430 and 22-3431.
[5] R. Vol. Refers to the volume of the record on appeal which is filed with the Kansas Supreme Court.
[6] Before the 1994 legislative session, a young woman had been raped and murdered by a person shortly after his release from prison. Her parents, law enforcement officers, parole and probation officers and a group of legislators formed an ad hoc Sexual Offender Task Force. No mental health professionals were involved. The task force presented emotional testimony before the Senate Judiciary Committee urging the legislature to not stop with harsher punishment for persons who committed new crimes, but to also keep those already in prison incarcerated for a longer time. That goal was exemplified by the remarks of the current Attorney General when she said, "We cannot

the Act creates "civil commitment" for individuals the legislature deems dangerous but not mentally ill. Pet. App 17a. The legislation begins with a "finding" that a "small but extremely dangerous group" of "predators" exist who do not have a mental defect or disease rendering them appropriate for involuntary treatment pursuant to the existing involuntary treatment statute. According to these findings, these individuals, who must either be serving sentences after conviction of sex crimes, or incarcerated pursuant to insanity acquittal commitments or incompetency proceedings, have "antisocial personality features" unamenable to existing mental treatment modalities and are likely to engage in future acts of sexual violence. Moreover the prognosis for rehabilitating such offenders is "poor" and the treatment needs of these individuals are "very long term." R. App. 1a, K.S.A. 59-29a01.

The statute defines "sexually violent predator" as:

> any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.[7]

The Act in turn defines "mental abnormality" as:

> a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others. R. App. 1a, K.S.A. 59-29a02(b).

The Act also sets forth a number of procedural requirements. A petition to declare a person a sexually violent predator may be filed prior to an individual's release from "total confinement' from a sentence for a sexually violent offense. For such individuals, this Act does not provide, or permit, commitment as an alternative to the individual's criminal sentence, but as an addition to it. Pet. App. 64a-66a, K.S.A. 59-29a03, 59-29a04.

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open our prison doors and let these animals back into our communities." The testimony barely touched on the matter of treatment. Pet. App. 25a, (R. Vol. 4 pp. 255, 256)

If the court determines that probable cause exists, the individual is entitled to a jury trial. R. App. 3a, K.S.A. 59-29a06. If the individual is determined to be a sexual predator, the person is committed to state custody, segregated from other persons committed for care and treatment because of mental illness. The Act does not provide for those committed the same privileges granted other individuals in the State subject to civil commitment. R. App. 3a , K.S.A. 59-29a07.

Unlike other civil committees, who can be released upon a finding of the head of the treatment facility, an individual committed under the sexually dangerous predator act may only be released upon court order. Each individual committed under the Act is entitled to an "annual review", with a right to a trial if the court decides that there is "probable cause" that the inmate's mental abnormality or personality disorder has so changed that the person is safe to be at large and will not engage in acts of sexual violence. A trial must also be held if the Secretary of the Department of Social and Rehabilitative Services determines that the inmate's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence. R. App. 5a, K.S.A. 59-29a08. While the committed individual is permitted to petition for release at any time, absent a determination of probable cause by the court, or a petition by the SRS, there is no right to an in-person hearing. See K.S.A. 59-29a08, 29a10, R. App. 5a, 6a.

THE COMMITMENT PROCEEDINGS IN THIS CASE

At the commitment trial, the State began its case by calling Respondent to testify. Mr. Hendricks outlined his family background, (R. Vol. 14 pp. 205-209) as well as his previous

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[7] As noted by Petitioner, this section was amended in 1995 to add the words, "if not confined in a secure facility" at

sexual offenses against children. (R. Vol. 14 pp. 209-247) He stated that during his latest incarceration. he had received no treatment for any sexual disorder. (R. Vol. 14 pp. 254, 255) He stated that he had not had any urge to have sexual contact with children since 1985, (R. Vol. 14 p.261) and that he was aware that were he to reoffend, he would spend the rest of his life in prison. (R. Vol. 14 p. 261) He acknowledged however, that he was a "pedophile" and while he hoped that he would not reoffend the only way he could "guarantee" that he would never reoffend was to die. (R. Vol. 14 p. 264)

Dr. Charles Befort, the chief psychologist at Larned State Hospital, testified for the State. He stated that Respondent was not mentally ill, nor was he suffering from a personality disorder. (R. Vol. 14 pp. 367, 368) He also stated that the term "mental abnormality" was not a proper diagnostic term. He also acknowledged that the term "mental abnormality" was circular, in that the behavior—predisposition to commit sex crimes—was used both to determine the condition and predict the behavior. (R. Vol.14 p. 374) He did identify Mr. Hendricks as a pedophile and stated his belief that Respondent would engage either in acts of sexual violence or sex acts with children if permitted to do so. (R. Vol. 14 p. 357)

Following the finding that he was a sexual predator, the Respondent was committed to Larned State Security Hospital. In February, 1995 he was moved to the Larned Correctional Mental Health Facility, which is a facility maintained by the State Department of Corrections. Dr. Befort, now the acting Clinical Director of the Sexual Predator Treatment program, testified in a subsequent state habeas corpus hearing that persons committed under the Act were not receiving any treatment. Indeed, Dr. Befort testified that he did not feel fully qualified to head a sexual predator treatment program. R. App. 20a. Dr. Befort stated that the

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the end of this phrase.

primary contact he had with Respondent and others committed under the Act was in a group session that he attempted when his schedule permitted He said that the focus of the sessions was the lack of treatment and that there was little if any discussion of the sexual deviancy issues which had lead to the commitments. R. App. 28a. Dr. Befort concluded that the Respondent and the other persons committed under the Act had received virtually no treatment. R. App. 20a,21a.

THE DECISION OF THE KANSAS SUPREME COURT

Respondent appealed his adjudication, arguing that the Sexually Violent Predator Act was punitive in purpose and effect, and that its application to the Respondent violated both the ex post facto clause of the Constitution and the prohibition against double jeopardy. Respondent also argued that the unexplained differences between the "treatment" afforded individuals committed under the sexual predator act and all other civilly committed individuals violated equal protection of the law. In addition, Respondent argued that the statute, by permitting indefinite incarceration without a finding that the individual was both mentally ill and dangerous, violated substantive due process. The Kansas Supreme Court, in a 4-3 decision, agreed with the last of these assertions, and invalidated the statute as violating substantive due process The Court did not reach the other constitutional arguments raised by Respondent.

The majority opinion[8] exhaustively reviewed the record in this case, the language and history of the statute, and the language of related commitment provisions in Kansas. The Court concluded that the Sexually Violent Predator Act authorizes the confinement of individuals

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[8] Petitioner incorrectly states that the opinion of the Court was specifically joined by only three members of the seven member court. In fact, the concurring opinion explicitly states, "I will set out my reasoning for joining Justice Allegrucci's majority opinion." Pet. App. 20a, 21a.

"upon a showing of dangerousness without a finding of mental illness." Pet. App. 20a. In reaching this conclusion, the court relied, in part, on the fact that the statute did not require a finding that the Respondent was suffering from a mental illness as defined by the Kansas civil commitment statutes. But, contrary to Petitioner's implications, the Court did not rest its conclusion solely upon that observation. Instead, the Court also relied upon the testimony of the State's own expert, who testified at the commitment proceeding that Respondent was not mentally ill, Pet. App. 20a, upon the stated legislative purpose of the Act, which the Court found to be "to continue the segregation of sexually violent offenders from the public" and from the record in this case, that "treatment for sexually violent predators is all but nonexistent." Pet. App. 15a.

In deciding whether confinement under these circumstances was compatible with due process, the Court turned for guidance to this Court's decision in Foucha v. Louisiana, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). In Foucha, this Court struck down Louisiana's attempt to hold indefinitely an individual acquitted by reason of insanity who, although having recovered his sanity, was found to have "an antisocial personality that sometimes leads to aggressive conduct." Justice White, writing for this Court, stated that Foucha could not be held indefinitely merely for having an antisocial personality disorder and being dangerous, that to permit such confinement would be "a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated the criminal law." 504 U.S. at 82-83

Applying this language, the majority held the preventive detention authorized by the Sexually Violent Predator Act to violate substantive due process. The majority determined that

the Act's attempt to confine an individual not mentally ill, but suffering a "mental abnormality" was no more permissible than Louisiana's attempt to confine an individual not mentally ill, but suffering from an "antisocial personality". The Court reached this conclusion not only because the term "mental abnormality" is not a recognized diagnostic term in the medical community, but because the State's own witness conceded that the term is circular, and most important, because the term is broad enough to apply to any individual who is predisposed to commit sex crimes. Pet. App. 19a.

REASONS FOR DENYING THE WRIT

I. The Court Should Await Further Interpretation in the State Courts of These Novel Statutes.

We agree with Petitioner that the Kansas Sexual Predator Act, providing for potential lifetime incarceration of individuals based upon a determination that they are likely to commit sex crimes in the future, presents important constitutional issues. Nevertheless, there are several compelling reasons that counsel against hearing this case.

First, as Petitioner notes, the Kansas Sexually Violent Predator Act and the few similar statutes that have been passed in four other states, are very recent enactments. Litigation interpreting these acts is just beginning to develop the important constitutional issues raised by these statutes. Thus, the California Sexually Violent Predators Act (Cal. Welfare & Ins. Code Ann. §6600, et. seq.) (West Supp. 1996) has not been the subject of a published opinion. The constitutionality of the Minnesota statute has not yet been decided by the Minnesota Supreme Court. See In re Linehan, 544 N.W.2d 308 (Minn. Ct. App. 1996). While the Supreme Court of Wisconsin has upheld the constitutionality of its statute on its face in the context of a motion to dismiss, the Court has not yet considered the Statute in the context of a

case that has proceeded through adjudication. State v. Carpenter, 541 N.W.2d 105 (Wis. 1995); State v Post. 541 N.W.2d 115 (1995). It is, of course, quite possible that the court will reevaluate the constitutional issues in that case when presented, as in Hendricks, with an actual adjudication. Finally, the litigation concerning the constitutionality of the Washington Sexual Predator Act, recently declared unconstitutional by a federal district court, is currently pending in the United States Court of Appeals for the Ninth Circuit. See Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995), on appeal, No. 95-35958 (9th Cir.) (argued Mar. 7, 1996). Because the significant issues raised by this case are just beginning their development in the lower courts, we urge this Court to await further development of the issues presented.[9]

This course is particularly appropriate since resolution of the single issue presented by Petitioner- -whether the Kansas Sexually Violent Predator Act violates substantive due process—will not begin to provide a clear answer to the serious constitutional questions raised by this and similar statutes. Like the similar Sexually Violent Predator Statute passed in Washington, the Kansas Sexually Violent Predator Act has been challenged as violating the Constitution's prohibition against ex post facto laws and for violating the Fifth Amendment's prohibition against double jeopardy. In Young v. Weston, supra, the court found the Washington Act constitutionally deficient in both respects. This conclusion was contrary to the conclusion reached by the Washington Supreme Court, In re Young, 857 P.2d 989 (Wash. 1993) and to the Wisconsin Supreme Court in State v Carpenter, 541 N.W.2d 105 (1995).

[9] While the Kansas Act is modeled after the Washington statutes, Rev. Code Wash. 71.09.010 et. seq., the other recent sexual predator statutes contain differences in language and procedure that may be relevant to determination of their constitutionality. Cal. Welfare &Ins. Code Ann. Sec. 6600, et. seq.; Wis. Stat. Ann. 975.001 et. seq. and 980.001 et. seq. ; Minn. Stat. Ann.253B.01 et. seq.

Thus, any serious effort to answer whether the Kansas Act is constitutional must address the ex post facto and double jeopardy concerns, as well as substantive due process.[10]

To put it mildly, the questions concerning whether the Act violates ex post facto and double jeopardy are at least as vexing and in need of resolution as the issue of substantive due process. While the courts have, in resolving the substantive due process issue, been guided by this Court's decision in Foucha, supra, and Addington v. Texas 441 U.S. 418, 99 S. Ct. 1804, 60 L.Ed.2d 323 (1979), this Court has yet to address the precise question of how to determine, for purposes of the ex post facto clause, whether a law is criminal or penal. See Young v. Weston, 898 F. Supp. at 751.

Thus, the Court in Young v. Weston relied upon analogous cases involving whether, for Fifth or Sixth Amendment purposes, a statute was penal or regulatory, to determine that the statute constituted a criminal penalty. As the court found, although the label attached to the statute is "civil", in purpose and effect, the Violent Predator Statute is a criminal enactment. Among the important considerations cited by the court were that: 1)the commitment statute only applies to individuals convicted of a sex crime or who have been charged with a crime but found incompetent to stand trial or not guilty by reason of insanity; 2)that the statute promotes traditional aims of punishment—retribution and deterrence—in that while it purports to concern itself with treatment, the statute insists that the treatment not occur until the inmate has fully served the sentence of imprisonment for the conduct that serves as the basis for the finding of the individual's mental abnormality; and 3) that the statute was promoted as a means of

[10] As noted, the Kansas Supreme Court, having found that the Act violates substantive due process, declined to reach the merits of these issues. However, if the Court believes that the extreme public importance of the constitutionality of this statute, and the sharp split in authority concerning the issues warrants review, (see Petition for Certiorari at 14), the Court should also undertake to decide the ex post facto, double jeopardy and equal the -

keeping convicted criminals in prison beyond the length of their sentence, and that release is far more difficult to obtain under these statutes than under traditional civil commitment statutes.[11] For similar reasons, the court in Young v. Weston found Washington's Sexual Predator Act to violate the Fifth Amendment's prohibition against double jeopardy Again, this determination has explicitly divided the courts, and if certiorari is to be granted, the Court should endeavor to determine that issue as well.

The Court should decline to review this statute for the additional reason that the Kansas Legislature has already amended its civil commitment laws in a way that, in the future, may alter the determination of the issue presented by Petitioner. Petitioner argues that the Kansas Supreme Court "held that the Act violates the substantive due process standard of Foucha because it permits commitment of persons who suffer from a dangerous "mental abnormality" that, while specifically defined in the Act does not fall within the definition of "mental illness" in the traditional Kansas civil commitment statute." Pet at 8-9. Senate Bill 469, which was signed by the Governor on April 14, 1996, defines as a "mentally ill person" any individual suffering from a "mental condition that has resulted in the commission of an act that would constitute a sexually violent offense," and provides for the civil commitment of such a person "who presents a continuing threat of harm to self or others." See S.B. 469, Sec 2(e) (1) (B), (f) (B). The bill, with some modifications, also removes the unique distinctions in procedure between civilly committed individuals and sexually violent predators. Because Kansas has amended its statute, and because individuals considered sexually violent predators can expected to be proceeded

protection challenges. For that reason, Respondent has filed, along with this response, a conditional cross-petition for certiorari raising these questions.

[11] An additional reason, not present in Washington, to consider the Kansas Sexual Predator Act a criminal statute is that the identical condition, a mental abnormality predisposing the individual toward repeated criminal behavior, is

against under this new statute, a review by this Court of the Kansas Supreme Court's decision may be of limited value.

II. The Kansas Supreme Court Correctly Applied This Court's Decision in Foucha v. Louisiana.

In its decision that the Sexually Violent Predator Act violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution, the Kansas Supreme Court relied upon Foucha v. Louisiana, supra. in which this court clearly held that to indefinitely confine as dangerous one who has a personality disorder or antisocial personality but is not mentally ill, is constitutionally impermissible. Foucha, 504 U.S. at 78. Similarly, the Kansas Supreme Court found that the state sex predator statute unconstitutional, based on Foucha, holding that "to indefinitely confine as dangerous one who has a mental abnormality is constitutionally impermissible." Hendricks, Pet. App. 19a.

The Petitioner seeks review of the Kansas Supreme Court's decision interpreting its own statute for two reasons. First, the State claims that this court's decision in Foucha is unclear as to whether strict scrutiny should be applied in the review of a statute which deprives individuals of their liberty. Second, the state argues that the State of Kansas inappropriately applied this Court's decision in Foucha when deciding that the state sexual predator statute unconstitutionally confined persons on the basis of mental "abnormality". While Respondent agrees that the Kansas Supreme Court relied heavily on this Court's opinion in Foucha in interpreting its state statute, it does not agree that the petition for certiorari should be granted in a case in which the Kansas Supreme Court correctly interpreted a state statute under well known principles of constitutional law set forth repeatedly by this Court.

basis for an upward departure in a criminal case under the Kansas Sentencing Guidelines. See

A. Strict scrutiny is the appropriate standard to judge the Kansas Sexual Predator Act.

Petitioner asks this court to set aside the Kansas Supreme Court's interpretation of the Kansas Sexual Predator Act, claiming that the test for interpreting whether a state statue deprives a person of liberty under the due process clause of the Fourteenth Amendment of the United States is unclear. However, a review of this court's decisions holing that liberty is a fundamental right belies the State's claim that the test is anything but strict scrutiny.

This court has repeatedly stated that an individual's liberty is fundamental in nature. See United States v. Salerno, 481 U.S. 739, 750, 107 S. Ct. 2095, 2103, 95 L. Ed. 2d 697 (1987). [I]ncarceration of persons is.. one of the most feared instruments of state oppression and freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments..." Foucha v. Louisiana, 504 U.S. 71, 90, 112, S. Ct. 1780, 1791, 118 L. Ed. 2d 437 (1992) (Kennedy, J., dissenting). Physical confinement in a mental institution entails a "massive curtailment of liberty". Vitek v. Jones, 445 U.S. 480, 491-92, 100 S. Ct. 1254, 1262-63, 63 L. Ed. 2d 552 (1980). In order to pass strict scrutiny, the challenged state interest must be narrowly tailored to serve that interest. Roe v. Wade, 410 U.S. 113, 155, 93, S. Ct. 705, 727-28, 35 L. Ed. 2d 147 (1973). This fundamental right to liberty is threatened by the Kansas Sexual Predator Act, K.S.A. 59-29a01 et. seq.

Contrary to the petitioner's claim that there is confusion among the courts as to the appropriate test for deciding whether a deprivation of liberty violates due process of law, not one court decision regarding the constitutionality of the various sexual predator statutes disputes that the test is anything but strict scrutiny. All the court opinions, both majority and dissenting,

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K.S.A.214716(b)(1)(G), App. 15a.

presume that review of such a statute is strict scrutiny. Hendricks, Pet. App. 35a., Matter of Linehan, 544 N.W. 2d 308, 316-317 (Minn. App. 1996), Young v. Weston, 898 F. Supp. 744, 748 (W. D. Wash. 1995), In Re Young, 122 Wash. 2d 1, 857 P. 2d 989, 1000(Durham, J.) and 1019 (Johnson, J., dissenting)(1993), State v. Post, 197 Wis 279, 641 N.W. 2d 115, 122 (Geske, J.)and 142, 146 (Abrahamson, J., dissenting)(1995).

Finally, the State never contended in its argument to the Kansas Supreme Court that the standard for analyzing the constitutionality of the sexual predator statute was anything but strict scrutiny. Having failed to challenge the strict scrutiny test below, the State cannot now complain that it is unclear or even wrong. There being no dispute on this issue among the various court decisions, or, for that matter between the parties, this court should deny the request for certiorari on this basis.

B. The Kansas Court correctly applied the substantive due process principles applicable to the commitment of dangerous individuals.

The Petitioner's second basis for requesting review must also fail. The State claims Foucha did not codify a set of rules for state's power to confine the mentally ill. It is true, of course, that Foucha did not attempt to codify in a rigid way any particular definition of the degree of mental illness necessary to support a civil commitment. What is clear, we submit, is that Foucha stands for the position that a permissible long-term and non-criminal confinement of a dangerous individual must have a basis more substantial than an amorphous "condition" predisposing an individual to commit future crimes, and that the Kansas Supreme Court correctly held that the sex predator statute passed by its legislature failed to measure up to this standard.

Contrary to the Petitioner's claim that the states are completely free to decide what type of abnormality" requires confinement, this court in Foucha clearly set forth the limits of such

preventive detention. In Foucha, Louisiana permitted the continued commitment of an insanity acquittee who was no longer mentally ill, but perceived to be dangerous based on his anti-social personality disorder, "a condition that is not a mental disease and ...is untreatable". Foucha, 504 U.S. at 75. Justice White's opinion found that continued commitment could not be based on dangerousness alone. Foucha 504 U.S. at 82, 83. Justice White, writing for the majority of the Court , went on to say:

> "The State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is not effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law." Foucha 504 U.S. at 82, 83 (emphasis added).

The Kansas Supreme Court correctly held that the Kansas Sexual Predator Act, K.S.A. 59-29a01,et seq. permits precisely what the court in Foucha forbids. It allows the state to hold indefinitely a person convicted of a crime who is not mentally ill but can be shown to have an abnormality that may lead to criminal conduct. Thus, the court noted that, as in Foucha, the state seeks to confine indefinitely people who could not be civilly committed under the constitutional standard for civil commitment. Indeed, the Kansas Act states that it is seeking to incarcerate people who are not mentally ill.

K.S.A. 59-29a01 provides, in part:

> "The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et. seq." .R. App. 1a, (emphasis added)

The Kansas Supreme Court found that treatment of such offenders and the goal of reintegrating them into society was incidental, at best. Hendricks, Pet. App.15a.

It should be noted that the petitioner does not even attempt to justify commitment based on antisocial personality disorder because Foucha found that an insanity acquittee with a diagnosed antisocial personality disorder could not be confined as mentally ill. Foucha, 504 U.S. at 77-83.

The Kansas Supreme Court also correctly concluded that the state's use of the term "mental abnormality" did not render this statute constitutional. Under section (a) of K.S.A. 59-29a02, R. App. 1a, a sexually violent predator means "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." (emphasis added). This definition in much broader that the concept of mental illness, as defined by Foucha and the cases cited above.

In fact, the definitional section makes clear that the term "mental abnormality" so broadens the concept of mental illness so as to render it meaningless. As noted by the Kansas Supreme Court, even the state's principal witness, Charles Befort, chief psychologist at Lamed State Security Hospital, testified that the term "mental abnormality" is a phrase used by clinicians to discuss abnormality or deviance, but that it is not a diagnosis or even defined in the DSM-III-R. Hendricks, Pet. App.18a, 19a.

The statutory definition of the term "mental abnormality" is circular at best and the Kansas Supreme Court so found. The term "mental abnormality" is defined in K.S.A. 59a02(b) as: "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexual violent offenses in a degree constituting such person a menace to the health and safety of others." A "mental abnormality" is a mental condition that

makes it likely that a person will commit sexually violent offenses. A mental abnormality is now a "mental condition". This definition is so broad it could conceivably include any collection of thought or ideas from which derives an impulse to act in a sexually inappropriate manner. The pathology is derived from the act itself, so that, if one commits the act, one is mentally ill enough to be committed. As the Kansas Supreme Court correctly concluded, the definition of "mental abnormality" is circular and has no clinical significance. Stated otherwise, as Judge Abrahamson noted in her dissenting opinion in State v. Post, 541 N. W. 2d at 143:

> "[A] "mental disorder" is defined in chapter 980 not in terms of mental illness, mental disease or mental defect but in terms of a predisposition to sexual crimes. Under chapter 980 "mental disorder" is "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence: Wis State. Sec. 980.01(2). Since every condition is necessarily either congenital or acquired, and since "emotional volitional capacity" simply describes the decision-making processes affecting how people act, mental disorder under chapter 980 means no more that a predisposition to engage in acts of sexual violence. Thus chapter 980 attempts to create a mental disorder authorizing lifetime commitment based not on mental illness but on past crimes for which the prospective committee has already served the prescribed sentence."

That a mental illness or the term "mental abnormality" may be defined in more than one way hardly suggests that mental illness can be defined howsoever the state pleases, as the Petitioner suggests. "If the constitutionally prescribed threshold of mental illness has no core meaning and can mean everything, then it means nothing." Post, at142 (Abrahamson, J., dissenting). We submit that the narrowest reading of Foucha supports the conclusion that states are not free to define all dangerous persons as mentally ill and thereby commit them to mental hospitals for their lifetime.

In the present case, the Petitioner is trying to broaden the definition of mental illness beyond that which this Court has held a commitment can be based. This court's decision in Foucha is clear, however, that detention of persons who are not mentally ill violates due process

of law under the Fourteenth Amendment. The Kansas Supreme Court reliance on Foucha was correct and certiorari should not be granted on this claim.

CONCLUSION

For the foregoing reasons, the Respondent requests that the Court deny the Issuance of a Writ of Certiorari and allow the issuance of the mandate of the Kansas Supreme Court in this matter.

Respectfully submitted,

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APPENDIX A

Kansas Sexually Violent Predator Act

K.S.A. 59-29a01

59-29a01. Commitment of sexually violent predators; legislative findings.

The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under K.S.A. 59-2901 et seq. and amendments thereto, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, therefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature.
History: L. 1994, ch. 316, 1; May 19.

K.S.A. 59-29a02

59-29a02. Same; definitions.

As used in this act:
(a) ``Sexually violent predator" means any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence, if not confined in a secure facility.
(b) ``Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.
(c) ``Predatory" means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.
(d) ``Sexually motivated" means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification.

(e) ``Sexually violent offense" means: (1) Rape as defined in K.S.A. 21-3502 and amendments thereto;
(2) indecent liberties with a child as defined in K.S.A. 21-3503 and amendments thereto;
(3) aggravated indecent liberties with a child as defined in K.S.A. 21-3504 and amendments thereto;
(4) criminal sodomy as defined in subsection (a)(2) and (a)(3) of K.S.A. 21-3505 and amendments thereto;
(5) aggravated criminal sodomy as defined in K.S.A. 21-3506 and amendments thereto;
(6) indecent solicitation of a child as defined in K.S.A. 21-3510 and amendments thereto;
(7) aggravated indecent solicitation of a child as defined in K.S.A. 21-2511 and amendments thereto;
(8) sexual exploitation of a child as defined in K.S.A. 21-3516 and amendments thereto;
(9) aggravated sexual battery as defined in K.S.A. 21-3518 and amendments thereto;
(10) any conviction for a felony offense in effect at any time prior to the effective date of this act, that is comparable to a sexually violent offense as defined in subparagraphs (1) through (9) or any federal or other state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this section;
(11) an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 and 21-3303, and amendments thereto, of a sexually violent offense as defined in this subsection; or
(12) any act which either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this act, has been determined beyond a reasonable doubt to have been sexually motivated.
(f) ``Agency with jurisdiction" means that agency which releases upon lawful order or authority a person serving a sentence or term of confinement and includes the department of corrections, the department of social and rehabilitation services and the Kansas parole board.
History: L. 1994, ch. 316, 2; L. 1995, ch. 193, 1; May 4.

K.S.A. 59-29a05

59-29a05. Same; determination of probable cause; evaluation; person taken into custody.

(a) Upon filing of a petition under K.S.A. 59-29a04, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made, the judge shall direct that person be taken into custody.
(b) Within 72 hours after a person is taken into custody pursuant to subsection (a), such person shall be provided with notice of, and an opportunity to appear in person at, a hearing to contest probable cause as to whether the detained person is a sexually violent predator. At this hearing the court shall: (1) Verify the detainer's identity; and (2) determine whether probable cause exists to believe that the person is a sexually violent predator. The state may rely upon the petition and supplement the petition with additional documentary evidence or live testimony.
(c) At the probable cause hearing as provided in subsection (b), the detained person shall have

the following rights in addition to the rights previously specified: (1) To be represented by counsel; (2) to present evidence on such person's behalf; (3) to cross-examine witnesses who testify against such person; and (4) to view and copy all petitions and reports in the court file.
(d) If the probable cause determination is made, the court shall direct that the person be transferred to an appropriate secure facility, including, but not limited to, a county jail, for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination.
History: L. 1994, ch. 316, 5; L. 1995, ch. 193, 4; May 4.

K.S.A. 59-29a06

59-29a06. Same; trial; counsel and experts; indigent persons; jury.

Within 60 days after the completion of any hearing held pursuant to K.S.A. 59-29a05 and amendments thereto, the court shall conduct a trial to determine whether the person is a sexually violent predator. The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced. At all stages of the proceedings under this act, any person subject to this act shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist such person. Whenever any person is subjected to an examination under this act, such person may retain experts or professional persons to perform an examination of such person's behalf. When the person wishes to be examined by a qualified expert or professional person of such person's own choice, such examiner shall be permitted to have reasonable access to the person for the purpose of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court, upon the person's request, shall determine whether the services are necessary and reasonable compensation for such services. If the court determines that the services are necessary and the expert or professional person's requested compensation for such services is reasonable, the court shall assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf. The court shall approve payment for such services upon the filing of a certified claim for compensation supported by a written statement specifying the time expended, services rendered, expenses incurred on behalf of the person and compensation received in the same case or for the same services from any other source. The person, the attorney general, or the judge shall have the right to demand that the trial be before a jury. Such demand for the trial to be before a jury shall be filed, in writing, at least four days prior to trial. Number and selection of jurors shall be determined as provided in K.S.A. 22-3403, and amendments thereto. If no demand is made, the trial shall be before the court.
History: L. 1994, ch. 316, 6; L. 1995, ch. 193, 5; May 4.

K.S.A. 59-29a07

59-29a07. Same; determination; commitment procedure.

(a) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If such determination that the person is a sexually violent predator is made by a jury, such determination shall be by unanimous verdict of such jury. Such determination may be appealed. If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the secretary of social and rehabilitation services for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. Such control, care and treatment shall be provided at a facility operated by the department of social and rehabilitation services. At all times, persons committed for control, care and treatment by the department of social and rehabilitation services pursuant to this act shall be kept in a secure facility and such persons shall be segregated at all times from any other patient under the supervision of the secretary of social and rehabilitation services and commencing June 1, 1995, such persons committed pursuant to this act shall be kept in a facility or building separate from any other patient under the supervision of the secretary. The department of social and rehabilitation services is authorized to enter into an interagency agreement with the department of corrections for the confinement of such persons. Such persons who are in the confinement of the secretary of corrections pursuant to an interagency agreement shall be housed and managed separately from offenders in the custody of the secretary of corrections, and except for occasional instances of supervised incidental contact, shall be segregated from such offenders. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct the person's release. Upon a mistrial, the court shall direct that the person be held at an appropriate secure facility, including, but not limited to, a county jail, until another trial is conducted. Any subsequent trial following a mistrial shall be held within 90 days of the previous trial, unless such subsequent trial is continued as provided in K.S.A. 59-29a06 and amendments thereto.

(b) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to be released pursuant to K.S.A. 22-3305 and amendments thereto, and such person's commitment is sought pursuant to subsection (a), the court shall first hear evidence and determine whether the person did commit the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on such person's own behalf, the extent to which the evidence could be reconstructed without the assistance of the person and the strength of the prosecution's case. If after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, the court shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

History: L. 1994, ch. 316, 7; L. 1995, ch. 193, 6; May 4.

K.S.A. 59-29a08

59-29a08. Same; annual examinations; discharge petitions by persons committed under this act over the secretary's objection at time of annual examination, procedure.

Each person committed under this act shall have a current examination of the person's mental condition made once every year. The person may retain, or if the person is indigent and so requests the court may appoint a qualified professional person to examine such person, and such expert or professional person shall have access to all records concerning the person. The yearly report shall be provided to the court that committed the person under this act. The court shall conduct an annual review of the status of the committed person. Nothing contained in this act shall prohibit the person from otherwise petitioning the court for discharge at this hearing. The secretary of the department of social and rehabilitation services shall provide the committed person with an annual written notice of the person's right to petition the court for release over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall forward the notice and waiver form to the court with the annual report. The committed person shall have a right to have an attorney represent the person at the hearing but the person is not entitled to be present at the hearing. If the court at the hearing determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged, then the court shall set a hearing on the issue. At the hearing, the committed person shall be entitled to be present and entitled to the benefit of all constitutional protections that were afforded the person at the initial commitment proceeding. The attorney general shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to have experts evaluate the person on the person's behalf and the court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and if released is likely to engage in acts of sexual violence.
History: L. 1994, ch. 316, 8; L. 1995, ch. 193, 7; May 4.

K.S.A. 59-29a09-29a11

59-29a09. Detention and commitment to conform to constitutional requirements.

The involuntary detention or commitment of persons under this act shall conform to constitutional requirements for care and treatment.
History: L. 1994, ch. 316, 9; May 19.

59-29a10. Petition for release; procedure.

If the secretary of the department of social and rehabilitation services determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released, the secretary shall authorize the person to petition the court for release. The petition shall be served upon the court and the attorney general. The court, upon receipt of the petition for release, shall order a hearing within 30 days. The attorney general shall represent the state, and shall have the right to have the petitioner examined by an expert or professional person of such attorney's choice. The hearing shall be before a jury if demanded by either the petitioner or the attorney general. The burden of proof shall be upon the attorney general to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and that if discharged is likely to commit predatory acts of sexual violence.
History: L. 1994, ch. 316, 10; L. 1995, ch. 193, 8; May 4.

59-29a11. Same; subsequent discharge petitions, limitations.

Nothing in this act shall prohibit a person from filing a petition for discharge pursuant to this act. However, if a person has previously filed a petition for discharge without the secretary of the department of social and rehabilitation services approval and the court determined either upon review of the petition or following a hearing, that the petitioner's petition was frivolous or that the petitioner's condition had not so changed that the person was safe to be at large, then the court shall deny the subsequent petition unless the petition contains facts upon which a court could find the condition of the petitioner had so changed that a hearing was warranted. Upon receipt of a first or subsequent petition from committed persons without the secretary's approval, the court shall endeavor whenever possible to review the petition and determine if the petition is based upon frivolous grounds and if so shall deny the petition without a hearing.
History: L. 1994, ch. 316, 11; May 19.

K.S.A. 59-2929

59-2929. Rights of patients. (a) Every patient being treated in any treatment facility, in addition to all other rights preserved by the provisions of this act, shall have the following rights:

(1) To wear the patient's own clothes, keep and use the patient's own personal possessions including toilet articles and keep and be allowed to spend the patient's own money;
(2) to communicate by telephone, both to make and receive confidential calls, and by letter, both to mail and receive unopened correspondence, except that if the head of the treatment facility should deny a patient's right to mail or to receive unopened correspondence under the provisions of subsection (b), such correspondence shall be opened and examined in the presence

of the patient;
(3) to conjugal visits if facilities are available for such visits;
(4) to receive visitors each day;
(5) to refuse involuntary labor and to be paid for any work performed other than the housekeeping of the patient's own bedroom and bathroom subject to the provisions of K.S.A. 1993 Supp. 59-2943;
(6) not to be subject to such procedures as psychosurgery, electroshock therapy, experimental medication, aversion therapy or hazardous treatment procedures without the written consent of the patient and the written consent of a parent, guardian or other person in loco parentis, if such patient has a living parent or a guardian or other person in loco parentis;
(7) to have explained, the nature of all medications prescribed, the reason for the prescription and the most common side effects and, if requested, the nature of any other treatments ordered;
(8) to communicate by letter with the secretary of social and rehabilitation services, the head of the treatment facility and any court, physician, psychologist, minister of religion, including Christian Science practitioner or attorney. All such communications shall be forwarded at once to the addressee without examination and communications from such persons shall be delivered to the patient without examination;
(9) to be visited by the patient's physician, psychologist, minister of religion, including Christian Science practitioner or attorney at any time; and
(10) to be informed orally and in writing of the patient's rights under this section upon admission to a treatment facility.
(b) The head of the treatment facility may, for good cause only, restrict a patient's rights under this section, except that the rights enumerated in subsections (a)(5) through (a)(10), and the right to mail any correspondence which does not violate postal regulations, shall not be restricted by the head of the treatment facility under any circumstances. Each treatment facility shall adopt regulations governing the conduct of all patients being treated in such treatment facility, which regulations shall be consistent with the provisions of this section. A statement explaining the reasons for any restriction of a patient's rights shall be immediately entered on such patient's medical record and copies of such statement shall be available to the patient and the parent, guardian or person in loco parentis, if such patient is less than 18 years of age, and the patient's attorney. In addition, notice of any restriction of a patient's rights shall be communicated to such persons in a timely fashion.
(c) Any person willfully depriving any patient of the rights protected by this section, except for the restriction of such rights in accordance with the provisions of subsection (b), shall be guilty of a class C misdemeanor.
History: L. 1965, ch. 348, 29; L. 1976, ch. 243, 32; L. 1986, ch. 211, 23; July 1.

K.S.A. 59-2924

59-2924. Transfer; discharge; conditional release. (a) The secretary of social and rehabilitation services or the secretary's designee may transfer any patient from any state psychiatric hospital under the secretary's control to any other state psychiatric hospital whenever the secretary or the

secretary's designee considers it to be in the best interests of the patient. Except in the case of an emergency, the patient's next of kin or guardian, if one has been appointed, shall be notified of the transfer, and notice shall be sent to the committing court not less than 14 days before the proposed transfer. The notice shall state the location to which the transfer is proposed and state that, upon request of the next of kin or guardian, an opportunity for a hearing on the proposed transfer will be provided by the secretary of social and rehabilitation services prior to such transfer.

(b) The secretary of social and rehabilitation services or the designee of the secretary may transfer any involuntary patient from any state psychiatric hospital to any state institution for the mentally retarded whenever the secretary of social and rehabilitation services or the designee of the secretary considers it to be in the best interests of the patient. Any patient transferred as provided in this subsection shall remain subject to the same statutory provisions as were applicable at the hospital from which the patient was transferred and in addition thereto shall abide by and be subject to all the rules and regulations of the institution to which the patient has been transferred. Except in the case of an emergency, the patient's next of kin or guardian, if one has been appointed, shall be notified of the transfer, and notice shall be sent to the committing court not less than 14 days before the proposed transfer. The notice shall state the location to which the transfer is proposed and state that, upon request of the next of kin or guardian, an opportunity for a hearing on the proposed transfer will be provided by the secretary of social and rehabilitation services prior to such transfer. No involuntary patient shall be transferred from a state psychiatric hospital to a state institution for the mentally retarded unless the superintendent of the receiving institution has found that the patient is mentally retarded and in need of care and training and that placement in the institution is the least restrictive alternative available. Nothing in this subsection shall prevent the secretary of social and rehabilitation services or the designee of the secretary from allowing a person to be admitted as a voluntary resident to a state institution for the mentally retarded, or from discharging such person from a state psychiatric hospital.

(c) When any proposed patient or involuntary patient has been ordered to any treatment facility pursuant to K.S.A. 59-2909, 59-2912, 59-2917 or 59-2918, and amendments thereto, the head of the treatment facility shall discharge the patient when the patient is no longer in need of treatment in the facility, except that no patient shall be discharged from a state psychiatric hospital, if there is a participating mental health center serving the area where the patient intends to reside, without receiving recommendations from such participating mental health center. The head of the treatment facility shall review and investigate all applications for involuntary admission and, if appropriate, shall divert patients to less restrictive treatment alternatives before further judicial proceedings occur whenever it is deemed appropriate by the head of the treatment facility. If diversion from involuntary treatment is not appropriate, the head of the treatment facility should be prepared to present evidence at the next hearing scheduled for the patient concerning further need for involuntary treatment.

(d) The head of the treatment facility may release any involuntary patient who has been committed for treatment pursuant to K.S.A. 59-2917 or 59-2918, and amendments thereto, on conditional release when the head of the treatment facility believes that (1) the release is in the best interests of the patient and (2) the patient is not likely to cause harm to self or others as long as the patient continues a plan of treatment in the community. The treatment facility shall

formulate a plan of treatment for each patient released on conditional release. The plan of treatment may include any conditions which the head of the treatment facility considers to be in the best interests of the patient or necessary to ensure that the patient is not likely to cause harm to self or others. The conditions may include a requirement that the patient be supervised by and report to a treatment facility which shall be responsible for ensuring that the patient complies with the conditions. The treatment facility in the community shall inform the head of the treatment facility from which the patient was discharged of any material noncompliance with the treatment plan. The head of the treatment facility from which the patient is released may change the plan of treatment or the conditions specified in the plan whenever the head considers it to be in the best interests of the patient or necessary to ensure that the patient is not likely to cause harm to self or others. If the patient fails to comply with any conditions of the treatment plan, the head of the facility may revoke the release and order the patient readmitted to the facility. The head of the treatment facility may authorize and order a law enforcement officer or other person to take into custody and transport the patient to a treatment facility.

Prior to the end of the 120 days on conditional release, and not less often than each 120 days thereafter while a patient is on conditional release, the head of the treatment facility from which the patient is released shall reexamine the facts relating to the treatment of the patient on conditional release.

(e) The head of the treatment facility shall not discharge an involuntary patient from conditional release unless at least seven days' notice of the intention to discharge the patient is given to the patient's guardian, if any, and to any other treatment facility which is involved in the treatment plan for the patient.

(f) Nothing in this section shall be construed to amend or modify or repeal any law relating to the confinement of persons charged with or convicted of a criminal offense.

History: L. 1965, ch. 348, 24; L. 1967, ch. 319, 1; L. 1976, ch. 243, 27; L. 1982, ch. 238, 2; L. 1986, ch. 211, 20; L. 1990, ch. 92, 29; Jan. 1, 1991.

K.S.A. 59-2925

59-2925. Notice of discharge or conditional release. The head of the treatment facility shall notify, in writing, the patient, the patient's attorney and the district court, which has ordered the treatment of the involuntary patient or the district court which has jurisdiction of the patient or the, referral of the proposed patient, of the patient's discharge or conditional release. When a notice of discharge is received, the court shall file the same in the record, which shall terminate the proceedings. When a notice of conditional release is received, the court shall file it in the records.

History: L. 1965; ch. 348, 25; L. 1976, ch. 243, 28; L. 1976, ch. 242, 80; L. 1982, ch. 238, 3; July 1.

59-2926.

APPENDIX B

Various Kansas Statutes Cited in Brief

K.S.A. 21-3503

21-3503. Indecent liberties with a child. (1) Indecent liberties with a child is engaging in any of the following acts with a child who is not married to the offender and who is under 16 years of age:

(a) Sexual intercourse; or

(b) any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both; or

(c) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

(2) Indecent liberties with a child is a class C felony.

History: L. 1969, ch. 180, § 21-3503; L. 1975, ch. 193, § 1; L. 1983, ch. 109, § 3; L. 1984, ch. 118, § 1; L. 1985, ch. 109, § 2; L. 1987, ch. 108, § 1; April 16.

K.S.A. 21-4501(c)

21-4501. Classes of felonies and terms of imprisonment. For the purpose of sentencing, the following classes of felonies and terms of imprisonment authorized for each class are established:

(c) Class C, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be fixed by the court at not less than three years nor more than five years and the maximum of which shall be fixed by the court to not less than 10 years nor more than 20 years.

K.S.A. 21-4504(b)

21-4504. Conviction of second and subsequent felonies; exceptions.

(b) If a defendant is convicted of a felony a third or subsequent time, the trial judge shall sentence the defendant as follows, upon motion of the prosecuting attorney:

(1) The court shall fix a minimum sentence of not less than the greatest nor more than three times the greatest minimum sentence authorized by K.S.A. 21-4501 and amendments thereto, for the crime for which the defendant is convicted; and

(2) the court may fix a maximum sentence of not less than the least nor more than three times the greatest maximum sentence provided by K.S.A. 21-4501 and amendments therto, for the crime.

History: L. 1969, ch. 180, § 21-4504; L. 1970, ch. 124, § 10; L. 1973, ch. 141, § 1; L. 1978, ch. 120, § 4; L. 1982, ch. 137, § 2; July 1.

K.S.A. 21-4608

21-4608. Multiple sentences. (1) When separate sentences of imprisonment for different crimes are imposed on a defendant on the same date, including sentences for crimes for which suspended sentences, probation or assignment to a community correctional services program have been revoked, such sentences shall run concurrently or consecutively as the court directs. Whenever the record is silent as to the manner in which two or more sentences imposed at the same time shall be served, they shall be served concurrently, except as provided in subsections (3), (4) and (5).

(2) Any person who is convicted and sentenced for a crime committed while on probation, assignment to a community correctional services program, parole or conditional release for a misdemeanor shall serve the sentence concurrently with or consecutively to the term or terms under which the person was on probation, assigned to a community correctional services program or on parole or conditional release, as the court directs.

(3) Any person who is convicted and sentenced for a crime committed while on probation, assigned to a community correctional services program, on parole, on conditional release for a felony shall serve the sentence consecutively to the term or terms under which the person was on probation, assigned to a community correctional services program or on parole or conditional release.

(4) Any person who is convicted and sentenced for a crime committed while on release for a felony pursuant to article 28 of chapter 22 of the Kansas Statutes Annotated shall serve the sentence consecutively to the term or terms under which the person was released.

(5) Any person who is convicted and sentenced for a crime committed while such person is incarcerated and serving a sentence for a felony in any place of incarceration shall serve the sentence consecutively to the term or terms under which the person was incarcerated.

(6) The provisions of this subsection relating to parole eligibility shall be applicable to persons convicted of crimes committed prior to January 1, 1979, but shall be applicable to persons convicted of crimes committed on or after that date only to the extent that the terms of this subsection are not in conflict with the provisions of K.S.A. 22-3717 and amendments thereto. In calculating the time to be served on concurrent and consecutive sentences, the following rules shall apply:

(a) When indeterminate terms run concurrently, the shorter minimum terms merge in and are satisfied by serving the longest minimum term and the shorter maximum terms merge in and are satisfied by conditional release or discharge on the longest maximum term if the terms are imposed on the same date.

(b) When concurrent terms are imposed on different dates, computation will be made to determine which term or terms require the longest period of imprisonment to reach parole eligibility, conditional release and maximum dates, and that sentence will be considered the controlling sentence. The parole eligibility date may be computed and projected on one sentence and the conditional release date and maximum may be computed and projected from another to determine the controlling sentence.

(c) When indeterminate terms imposed on the same date are to be served consecutively, the minimum terms are added to arrive at an aggregate minimum to be served equal to the sum of all minimum terms and the maximum terms are added to arrive at an aggregate maximum equal to

the sum of all maximum terms.

(d) When indeterminate sentences are imposed to be served consecutively to sentences previously imposed in any other court or the sentencing court, the aggregated minimums and maximums shall be computed from the effective date of the subsequent sentences which have been imposed as consecutive. For the purpose of determining the sentence begins date and the parole eligibility and conditional release dates, the inmate shall be given credit on the aggregate sentence for time spent imprisoned on the previous sentences, but not exceeding an amount equal to the previous minimum sentence less the maximum amount of good time credit that could have been earned on the minimum sentence. For the purpose of computing the maximum date, the inmate shall be given credit for all time spent imprisoned on the previous sentence. This method for computation of the maximum sentence shall be utilized for all sentences computed pursuant to this subsection after July 1, 1983.

Nothing in this subsection (6)(d) shall affect the authority of the Kansas parole board to determine the parole eligibility of inmates pursuant to subsection (d) of K.S.A. 22-3717 and amendments thereto.

(e) When consecutive sentences are imposed which are to be served consecutive to sentences for which a prisoner has been on probation, assigned to a community correctional services program, on parole or on conditional release, the amount of time served on probation, assigned to a community correctional services program, on parole or on conditional release shall not be credited as service on the aggregate sentence in determining the parole eligibility, conditional release and maximum dates.

(7) When a definite and an indefinite term run consecutively, the period of the definite term is added to both the minimum and maximum of the indeterminate term and both sentences are satisfied by serving the indeterminate term.

(8) When a defendant is sentenced in a state court and is also under sentence from a federal court or other state court or is subject to sentence in a federal court or other state court for an offense committed prior to the defendant's sentence in a Kansas state court, the court may direct that custody of the defendant may be relinquished to federal or other state authorities and that such state sentences as are imposed may run concurrently with any federal or other state sentence imposed.

History: L. 1969, ch. 180, § 21-4608; L. 1978, ch. 120, § 8; L. 1982, ch. 150, § 1; L. 1983, ch. 111, § 1; L. 1985, ch. 111, § 1; L. 1986, ch. 123, § 9; L. 1987, ch. 113,§ 1; May 7.

K.S.A. 22-3429

22-3429. Deferring sentence pending mental examination. After conviction and prior to sentence and as part of the presentence investigation authorized by K.S.A. 21-4604, the trial judge may order the defendant committed to a state hospital or any suitable local mental health facility for mental examination, evaluation and report. If adequate private facilities are available and if the defendant is willing to assume the expense thereof such commitment may be to a private hospital. A report of the examination and evaluation shall be furnished to the judge and shall be made available to the prosecuting attorney and counsel for the defendant. A defendant may not

be detained for more than 120 days under a commitment made under this section.
History: L. 1970, ch. 129, 22-3429; July 1.

K.S.A. 22-3430

22-3430. Commitment to certain state institutions, when; costs; order of commitment; appeal. If the report of the examination authorized by the preceding section shows that the defendant is in need of psychiatric care and treatment and that such treatment may materially aid in his rehabilitation and that the defendant and society is not likely to be endangered by permitting the defendant to receive such psychiatric care and treatment, in lieu of confinement or imprisonment, the trial judge shall have power to commit such defendant to any state or county institution provided for the reception, care, treatment and maintenance of mentally ill persons. The court may direct that the defendant be detained in such institution until further order of the court or until the defendant is discharged under K.S.A. 22-3431. No period of detention under this section shall exceed the maximum term provided by law for the crime of which the defendant has been convicted. The trial judge shall, at the time of such commitment, make an order imposing liability upon the defendant, or such person or persons responsible for the support of the defendant, or upon the county or the state, as may be proper in such case, for the cost of admission, care and discharge of the defendant.

The defendant may appeal from any order of commitment made pursuant to this section in the same manner and with like effect as if sentenced to a jail, or to the custody of the director of penial institutions had been imposed in this case.
History: L. 1970, ch. 129, 22-3430; July 1.

K.S.A. 22-3431

22-3431. Disposition upon completion of treatment. Whenever it appears to the chief medical officer of the institution to which a defendant has been committed under K.S.A. 22-3430 and amendments thereto, that such person is not dangerous to self or others and that such person will not be improved by further detention in such institution, such person shall be returned to the court where convicted and shall be sentenced, committed, granted probation, assigned to a community correctional services program or discharged as the court deems best under the circumstances. The time spent in a state or county institution pursuant to a commitment under K.S.A. 22-3430 and amendments thereto shall be credited against any sentence, confinement or imprisonment imposed on the defendant.
History: L. 1970, ch. 129, 22-3431; L. 1971, ch. 114, 8; L. 1986, ch. 123, 22; July 1.

K.S.A. 22-3717(a)(c)(1)

22-3717. Parole eligibility; release, when; hearings; rules and regulations; conditions of parole.

(a) Except as otherwise provided by this section, an inmate, including an inmate sentenced pursuant to K.S.A. 21-4618 and amendments thereto, shall be eligible for parole after serving the entire minimum sentence imposed by the court, less good time credits.
(c) Except as provided in subsection (d), if an inmate is sentenced to imprisonment for more than one crime and the sentences run consecutively, the inmate shall be eligible for parole after serving the total of:
(1) The aggregate minimum sentences, as determined pursuant to K.S.A. 21-4608 and amendments thereto, less good time credits for those crimes which are not class A felonies; and

History: L. 1970, ch. 129, 22-3717; L. 1972, ch. 317, 90; L. 1973, ch. 339, 88; L. 1974, ch. 403, 10; L. 1975, ch. 203, 1; L. 1976, ch. 168, 2; L. 1978, ch. 120, 13; L. 1979, ch. 94, 2; L. 1981, ch. 156, 1; L. 1982, ch. 137, 3; L. 1982, ch. 150, 2; L. 1983, ch. 116, 1; L. 1984, ch. 131, 1; L. 1985, ch. 111, 2; L. 1986, ch. 128, 3; L. 1986, ch. 123, 25; L. 1986, ch. 136, 3; L. 1987, ch. 118, 1; L. 1988, ch. 115, 1; May 19.

K.S.A. 22-3718

22-3718. Conditional release.
An inmate who has served the inmate's maximum term or terms, less such work and good behavior credits as have been earned, shall, upon release, be subject to such written rules and conditions as the Kansas parole board may impose, until the expiration of the maximum term or terms for which the inmate was sentenced or until the inmate is otherwise discharged. If the court which sentenced an inmate specified at the time of sentencing the amount and the recipient of any restitution ordered as a condition of release pursuant to this section, the parole board shall order as a condition of release that the inmate pay restitution in the amount and manner provided in the Journal Entry unless the board finds compelling circumstances which would render a plan of restitution unworkable. If the inmate was sentenced before July 1, 1986, and the court did not specify at the time of sentencing the amount and the recipient of any restitution ordered as a condition of release, the parole board shall order as a condition of release that the inmate make restitution for the damage or loss caused by the inmate's crime in an amount and manner determined by the board unless the board finds compelling circumstances which would render a plan of restitution unworkable. If the inmate was sentenced on or after July 1, 1986, and the court did not specify at the time of sentencing the amount and the recipient of any restitution ordered as a condition of release pursuant to this section, the parole board shall not order restitution as a condition of release unless the board finds compelling circumstances which justify such an order.
History: L. 1970, ch. 129, 22-3718; L. 1972, ch. 317, 91; L. 1986, ch. 128, 4; July 1.

K.S.A. 22-3725

22-3725. Good time credits. (a) For the purpose of determining an inmate's eligibility for parole or conditional release, regardless of when the inmate was sentenced or committed the crime for

which sentenced, good time credits shall be allocated as follows:

GOOD TIME TABLE

(Assumed 360-Day Years, 30-Day Months)

SENTENCE	GOOD TIME EARNED			MUST SERVE		
Minimum (or) Maximum	Years	Months	Days	Years	Months	Days
5	2	0	0	3	0	0
20	9	6	0	10	6	0
45	22	0	0	23	0	0
80	39	6	0	40	6	0
100	49	6	0	50	6	0

(b) Maximum good time credits for sentences of less than two years shall be computed as follows: One day for every three days served and one month for every year served.

(c) Maximum good time credits for sentences greater than two years shall be computed as follows: One-half of the sentence less six months.

(d) Good time credits shall be awarded on an earned basis pursuant to rules and regulations adopted by the secretary of corrections.
History: L. 1988, ch. 115, 2; May 19.

K.S.A. 21-4716(a)(2)(G)(ii)
21-4716. Imposition of presumptive sentence; departure sentencing; finding substantial and compelling reasons for departure; mitigating or aggravating factor considered in determining if reasons exist; reasons stated on record. (a) The sentencing judge shall impose the presumptive sentence provided by the sentencing guidelines for crimes committed on or after July 1, 1993, unless the judge finds substantial and compelling reasons to impose a departure. If the sentencing judge departs from the presumptive sentence, the judge shall state on the record at the time of sentencing the substantial and compelling reasons for the departure.
(2) Subject to the provisions of subsection (b)(3), the following nonexclusive list of aggravating factors may be considered in determining whether substantial and compelling reasons for departure exist:

(G) The defendant's current crime of conviction is a crime of extreme sexual violence and the

defendant is a predatory sex offender. As used in this subsection:
(ii) "Predatory sex offender" is an offender who has been convicted of a crime of extreme sexual violence as the current crime of conviction and who:
(a) Has one or more prior convictions of any crimes of extreme sexual violence. Any prior conviction used to establish the defendant as a predatory sex offender pursuant to this subsection shall also be counted in determining the criminal history category; or
(b) suffers from a mental condition or personality disorder which makes the offender likely to engage in additional acts constituting crimes of extreme sexual violence.
History: L. 1992, ch. 239, 16; L. 1993, ch. 291, 263; Amended, L. 1994, ch. 341, 2; July 1.

APPENDIX C

Direct Examination of Dr. Charles Befort
from Habeas Corpus Hearing.

Pawnee County District Court
Case No. 95 C 55

MR. WEILERT: Your Honor, I don't believe they're as specific as is required by the code of civil procedure, but they do have a general denial.

THE COURT: And they're verified.

MR. WEILERT: Yes.

THE COURT: Are you ready to proceed?

MR. WEILERT: Yes, Your Honor.

THE COURT: You may proceed.

MR. WEILERT: Thank you, Your Honor. We would call Charles Befort.

CHARLES BEFORT,

called as a witness in behalf of the Petitioners, being of legal age and after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WEILERT:

Q. Would you tell us your name and occupation please, sir?

A. My name is Charles Befort; I'm chief psychologist at Larned State Hospital.

Q. And Dr. Befort, we've met a few times before, haven't we?

A. Yes, we have.

Q. I'd like to go back to the period of time before we first met, say to about July of 1994, can you tell

us what your occupation was at that time?
A. Same occupation.
Q. Okay. And as I recall, you were the chief psychologist and that included work at both the Larned State Hospital and the State Security Hospital?
A. That's right.
Q. And this once again we're talking about approximately July of 1994, those were or that was a full-time position, was it not?
A. Yes.
Q. And did you have any difficulty at all in filling up your 40 or 50 or 60 hours a week?
A. Not at all.
Q. Can you tell us something about your educational background, sir?
A. I have a doctor of philosophy degree in psychology from Oklahoma State University.
Q. And you have been a licensed psychologist for how long, sir?
A. Since about 1971.
Q. And it's my understanding that you did not have any type of internship or fellowship in the treatment of sexual offenders, is that right?
A. That's right.

Q. And your employment since obtaining your PhD has been at Larned State Hospital, has it not?
A. Yes. And I also work in a mental health center one day a week.
Q. You told me where that was and I don't remember.
A. Greensburg.
Q. The Iroquois Center I believe?
A. That's right.
Q. Now, before July of 1994 then, would it be correct to say that you did not have any specialized advanced training in the treatment of sex offenders?
A. That's correct.
Q. In, I believe it was September of 1994, I along with some other lawyers took your deposition in Mr. Hendricks' case and the case of Richard Beam, is that right?
A. That's right.
Q. And that was at the district attorney's office in Wichita?
A. Yes.
Q. Now, during the course of that deposition you testified that in your opinion you were not qualified to be a director of a sexual treatment program, is that right?
A. I can't remember, but that's probably what I would

testify to.
Q. So here today you feel that you're not qualified to be a director of a sexual treatment program?
A. I am more qualified than I was a year ago, yes.
Q. Okay. The fact remains though that in your personal opinion, you don't, still don't think you're qualified, do you?
A. Not fully.
Q. Now, in, I believe in that same deposition and at times later, you have given some information as to what you felt a sexual treatment program ought to contain, is that correct?
A. I gave that in a deposition a couple of weeks ago.
Q. Okay.
A. That what you're referring to?
Q. That plus I think some others but we'll stick with the one a couple of weeks ago. That was August 16th in Wichita, wasn't it?
A. Yes.
Q. And that was in the case of State of Kansas versus Jack Spratt?
A. Yes.
Q. And in that deposition you talked about the fact that there were no clinical people giving any treatment to the persons confined in the sexual

treatment program at the Larned mental health facility, is that right?
A. Except for me, yes.
Q. Now, in your position as of August 16th of 1995, just a couple weeks ago, you, I believe, said that the offender or pardon me, the people in the sexual treatment program were receiving essentially no treatment; do you recall saying that?
A. Yes.
Q. And that's a true statement, is it not?
A. I believe so.
Q. Are you familiar with a sexual predator treatment program composition which it's my understanding was prepared by Janet McClellan and for the sexual treatment program at Larned?
A. It's been sometime ago, I remember putting it together, yes.
Q. Did you assist in putting that together?
A. Not a great deal, mostly looked it over, checked it for internal consistency and also just to educate myself as to what was in there.
Q. Okay. Who put that treatment program proposal together?
A. I think Ms. McClellan did most of that.
Q. Would it be fair to say that the treatment program

in your opinion as a psychologist should include persons who have an expertise in the psychological and psychiatric fields?

A. Yes.

Q. And would it be your opinion that the director of that program should have expertise in those areas?

A. Not necessarily.

Q. Should there be a, if the director of the program does not have that expertise, should the person in charge of the actual clinical department have that expertise?

A. Yes.

Q. And you've testified that you feel you do not have that expertise, is that correct?

A. Not entirely, that's right.

Q. Now Ms. McClellan, do you know anything about her educational background?

A. Some.

Q. She has degrees, I believe in relating to business and law enforcement, does she not?

A. Yes.

Q. Doesn't have any training in psychology or psychiatry, does she?

A. Not that I know of.

Q. The document that we just spoke of, the sexual

predator treatment program composition, it lists several items that are in bold face required characteristics. One of the required characteristics, number three, is that the program must have adequate staffing in terms of numbers, quantifications and gender representation. Now the sexual treatment program at Larned doesn't have that, does it?

A. Not at this time.

Q. The fourth one is it says that the program must have adequate funding, not only for the necessary and required staff, but for materials, equipment, staff training, resident treatment and education, and for adequate space to carry out its assigned tasks. The program at Larned doesn't have that, does it?

A. I think it has all that. It has plenty of funding and we have lots of space.

Q. You don't have the materials and equipment that you would consider necessary in a sexual treatment program though, do you?

A. I think we have most of it, not all of it.

Q. What don't you have?

A. I don't know if we have the plethysmograph lab in place, I don't know if we have the equipment yet. We're going to have a polygraph lab and I believe

we're still waiting for that. We do have plenty of testing materials and books and videotapes and so forth and we can get whatever we need.

Q. So you have some of that but not all of it?

A. Quite a bit.

Q. In, I believe it was October of 1994, Mr. Hendricks was admitted to the sexual treatment program, is that correct?

A. That's probably right.

Q. And at the time Mr. Hendricks was admitted, actually before that time, you had done an evaluation of Mr. Hendricks, haven't you?

A. Yes.

Q. And you testified at his commitment hearing?

A. Yes.

Q. And at least to a significant degree, your testimony is what resulted in him being committed, isn't that correct?

A. I assume that.

Q. You were the only psychologist who testified on behalf of the state that offered any opinion as to Mr. Hendricks, whether or not he was a sexual predator as defined by the statute?

A. As I recall, that's correct.

Q. You recognize, do you not, sir, that that creates a

significant barrier for you being an effective treatment giver?

A. Yes.

Q. And that's a widely recognized premise in the psychological and psychiatric fields, isn't it?

A. I believe so.

Q. And up until this time you're the only psychologist or psychiatrist that Mr. Hendricks has had any contact with, aren't you? In the sexual treatment program?

A. That's correct.

Q. For the reasons you just stated, would you agree that it would be extremely difficult, if not impossible, for you to give effective treatment to Mr. Hendricks?

A. I assume that, with respect to certain issues, yes.

Q. In fact, those are the, for lack of a better term, the sexual issues that cause him to be here, right?

A. Sexual deviant, yes.

Q. I didn't have a chance to go through a lot of them, but in whatever that big blue book is, it's kind of a history of Mr. Hendricks since he arrived in Larned back in October of '94, for the first several months of that history, your name appears very sporadically, and is that because you saw Mr.

Hendricks very sporadically?
A. That's true.
Q. And that was because you were involved with your other full-time job, right?
A. Right. At that point I was simply consulting psychologist for SRS.
Q. And then at what point did you become the, I believe you're the acting clinical director, is that right?
A. Temporary acting clinical director something, anyway since March the 20th.
Q. And since March the 20th then, pardon me, before March the 20th, did Mr. Hendricks receive any treatment dealing with the sexual deviancy issues that brought him here?
A. Probably a little provided by Mr. Wright.
Q. And who is Mr. Wright?
A. Mr. Wright's a person with a psychology degree who used to be on staff and he saw Mr. Hendricks in individual sessions.
Q. Was that a bachelor's degree in psychology?
A. Master's degree.
Q. Master's degree? And who was supervising him?
A. As a consulting psychologist, he did connect with me quite a bit. We didn't spend a lot of time going over those specifics, though, he just took it from

there, flew by the seat of his pants.
Q. Now correct me if I am wrong, but isn't the law in the State of Kansas regarding master's level psychologist is that they are required to work under the direction of a PhD level psychologist?
A. He wasn't functioning as a psychologist formally.
Q. What was he functioning as?
A. A forensic counselor or forensic specialist, some title.
Q. So something below a master's level psychologist and something below a licensed clinical social worker?
A. Yes.
Q. How long was Mr. Wright on staff?
A. He was one of the first folks on staff, in the summer or early fall, and I believe he left employment in March this year. That's my best recollection.
Q. Okay. So other than whatever contact you had with Mr. Wright, that was the only treatment he got up until March of '95.
A. Basically in terms of counseling, right.
Q. I notice there are some references in Mr. Hendricks' record to some group sessions, notations that you have made?
A. Yes.

Q. Now am I correct, sir, that those group sessions are not dealing with sexual deviancy issues at this point?
A. A few times it may have come up, depending upon what the men wanted to discuss. But for the most part, no.
Q. They're primarily dealing, for lack of a better term, kind of a group session about the fact that there aren't any treatment programs in place, isn't that correct?
A. That has been a gripe, yes.
Q. It's been a consistent gripe throughout your period as acting clinical director, hasn't it?
A. Pretty well.
Q. And basically your response during those sessions has been something along the lines of we're working on it, we're trying to get something in place, that type of thing?
A. Yes.
Q. Now, Mr. Hendricks has been here for about ten months now, right?
A. Yes.
Q. You have had occasion to read the sexual predator law on more than one occasion I'm sure?
A. Yes.

Q. And you know that it requires an annual report to the court?
A. Yes.
Q. Who's going to prepare that report for Mr. Hendricks in October?
A. I don't know. I assume I will.
Q. Now, in making that report, you're going to have to tell the court that he has had no opportunity for meaningful treatment, aren't you?
A. Yes.
Q. And in making a report of that type, you are effectively denying Leroy any possible chance for release in October of 1995, aren't you?
A. In terms of following the statute, the requirement that he's no longer dangerous or likely to engage in such behavior, yes, that hasn't been modified and it certainly hasn't been dealt with in treatment.
Q. And the reason it hasn't been dealt with in treatment is because the sexual treatment program at Larned Correctional Mental Health Facility basically doesn't exist outside of you, isn't that correct?
A. In terms of the addressing the sexual deviance, that's essentially correct.
Q. You recognize Mr. Blumenshine?
A. Yes.

No. 95-1649

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STATE OF KANSAS,
Petitioner,
v.
LEROY HENDRICKS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

PETITIONER'S REPLY BRIEF

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IN THE

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PETITIONER'S REPLY BRIEF

FURTHER REASONS FOR GRANTING THE WRIT

The Brief in Opposition ("Opp.") adopts verbatim the Petition's statement of the questions presented, and acknowledges that the Kansas Sexually Violent Predator Act "presents important constitutional issues," Opp. 9. There is no dispute that the decision below by the Kansas Supreme Court rested solely and squarely on substantive due process grounds which are clearly presented for this Court's review. Thirty-three other states and two territories agree with the State of Kansas that this Court's guidance is urgently needed on the constitutionality of

the Kansas Act and similar statutes already enacted or under consideration. And this Court has already decided to stay the mandate of the Kansas Supreme Court pending action on the Petition and any plenary review that may follow.[1] Under these circumstances, the Brief in Opposition offers no legitimate justification for this Court to decline review.

I. THERE IS NO REASON TO DELAY REVIEW OF ISSUES THAT HAVE BEEN THOROUGHLY EXAMINED BY THREE STATE SUPREME COURTS AND ONE FEDERAL DISTRICT COURT, WITH CONFLICTING RESULTS WHICH NUMEROUS STATES REQUEST THIS COURT TO RESOLVE.

Including the State of Kansas, the petitioner in this case, no less than thirty-four states and two territories have indicated to this Court that they require immediate guidance on the issues presented in the Petition in order to evaluate their options for dealing with sexually violent predators in a constitutional fashion. *See* Brief of the States of Washington *et al.* as Amici Curiae (filed May 13, 1996).

In spite of this demonstrated necessity for the immediate resolution of these complex and important constitutional issues, Respondent maintains that this Court should deny review in this case for three reasons: (1) the existing sexual predator statutes are "recent enactments," Opp. 9; (2) the statutes may raise other issues such as ex post facto and double jeopardy concerns that the Kansas Petition does not raise, *id.* 10-11; and (3) the Kansas Legislature recently amended the Kansas civil commitment law in a way that may permit its use for the treatment of sexual predators in future cases, *id.* 12. Each of these contentions merits only brief discussion.

---

[1] Order of April 22, 1996 (A-843).

First, although the six existing sexual predator statutes are relatively recent enactments, the Petition in this case amply demonstrates that the courts that have addressed such statutes already have split clearly and deeply on their constitutionality. At this time, the Washington Supreme Court and the Wisconsin Supreme Court have upheld their statutes against substantive due process challenges, *see In re Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993); *State v. Post*, 197 Wis. 2d 279, 541 N.W. 2d 115 (1995), *cert. pending*, No. 95-8204, while the Kansas Supreme Court in this case and one federal district court, *see Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995, *appeal pending*, No. 95-35958 (9th Cir.) (argued Mar. 7, 1996), have declared the Kansas and Washington statutes unconstitutional. Given the extreme public importance of the questions presented, and the compelling interests at stake on both sides of these issues, this sharp split of authority warrants the Court's immediate attention. The States have strongly indicated that they would like to know whether they constitutionally may adopt and implement sexual predator statutes. Presumably, those individuals who have been or may be committed under these statutes also would prefer that the constitutionality of these statutes be determined sooner rather than later.

Second, although it is true that the Kansas Supreme Court invalidated the Kansas Act solely on substantive due process grounds and the Petition therefore only raises that issue, this state of affairs should, if anything, counsel in favor of granting certiorari here. That issue is thoroughly discussed in the Kansas Supreme Court's majority and dissenting opinions, and the Court thus may limit its focus to substantive due process, which by itself raises substantial and complex questions. Petitioner is unaware of any rule or practice of this Court to grant certiorari in cases involving constitutional challenges to a state statute only if every possible federal constitutional

ground has been addressed by the state supreme court and presented in the petition for a writ of certiorari.[2]

Third, Respondent's reference to a recent amendment to the Kansas civil commitment law is a red herring. The bill at issue (Senate Bill No. 706, enacted in April 1996) specifically provides that it shall not take effect unless and until the Kansas Supreme Court's mandate in this case issues. This Court's order of April 22, 1996, stays that mandate "pending this Court's action on the petition for a writ of certiorari" and further provides that "should the petition for a writ of certiorari be granted, this order is to continue in effect pending the issuance of the mandate of this Court."[3] Senate Bill No. 706 provides that in any event the amendment to the civil commitment law will expire automatically on June 30, 1977; any re-enactment of such a provision could not occur prior to the legislature's 1997 legislative session, which begins next January. It is clear from these provisions that the Kansas Legislature strongly prefers the Kansas Sexually Violent Predator Act at issue in this case to any other approach to the sexual predator problem. The amendment merely provides state officials with some fall-back authority to commit sexually violent predators for long term care and treatment in the event this

[2] Nonetheless, in the event the Court wishes also to address the other constitutional objections that have been raised to the Kansas Act and similar statutes, it can do so by granting Respondent's Conditional Cross-Petition, which would raise ex post facto, double jeopardy and equal protection issues. The State of Kansas is filing a Memorandum stating that it stands ready to brief and argue those issues and does not oppose the granting of the Cross-Petition in the event that is what the Court decides to do. The State would request, however, that in that event the two cases be briefed and argued separately in order to permit adequate brief space to address these issues and ample argument time to respond to the Court's concerns.

[3] Petitioner's Application to Stay Mandate, which the April 22 order granted, advised this Court of the enactment of Senate Bill No. 706.

Court denies certiorari or holds in this case that the Act is unconstitutional. Because Senate Bill No. 706 will have no legal or practical effect so long as this case is pending in this Court or if this Court holds the Act constitutional, it should in no way interfere with this Court's plenary review of this case and the more broadly applicable issues it presents.

II. ONLY THIS COURT IS IN A POSITION TO DECIDE WHETHER THE KANSAS SUPREME COURT AND OTHER LOWER COURTS HAVE CORRECTLY APPLIED THE COURT'S DECISION IN *FOUCHA v. LOUISIANA*, 504 U.S. 71 (1992)

Respondent contends that there is no question but that *Foucha* requires the application of strict scrutiny in the situation presented here. Opp. 13-15. As demonstrated beyond dispute in the Petition, however, several members of this Court in the *Foucha* case questioned what standard should be applied, *see* 504 U.S. at 115-16 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.), and the majority never declared the standard it was applying. The same situation occurred in the Kansas Supreme Court in this case. *See* Pet. App. 33a, 36a (Larson, J., dissenting, joined by two other justices). Thus, Respondent's suggestion that the State has somehow waived the standard of review—when the Kansas Supreme Court majority failed to articulate the standard it was applying and the dissent pointedly observed that the standard was not clear—is not only unsupportable on the record presented but, if accepted, would create the bizarre result that this Court would be compelled to apply strict scrutiny to the Kansas Act even if a majority determined that strict scrutiny was not the correct standard.

Respondent's argument that the Kansas Supreme Court correctly applied *Foucha* to invalidate the Act, Opp. 15-19, is more properly addressed in a brief on the merits than in an opposition to a petition for a writ of cer-

tiorari. Respondent does not, and indeed cannot, dispute that the lower courts have divided sharply in their application of *Foucha* to sexual predator statutes. Based on the requirements for obtaining the stay that this Court ordered in this case on April 22, 1996, it appears that at least five members of the Court are of the view that there are at least plausible arguments that the Kansas Supreme Court incorrectly interpreted *Foucha*. Moreover, at least thirty-four states and two territories urge that the rules after *Foucha* are unclear and require further resolution by this Court.

CONCLUSION

For the reasons set forth in this Reply and in the Petition for a Writ of Certiorari, the State of Kansas respectfully requests that the Court grant plenary review of both questions presented in the Petition.

Respectfully submitted,

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NO. 95-1649

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

STATE OF KANSAS,

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LEROY HENDRICKS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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INTEREST OF THE AMICI

Washington and the other named states submit this brief as amici curiae in support of the Petitioner, Kansas, which seeks review by Petition for a Writ of Certiorari of a Kansas State Supreme Court decision striking down that State's Sexually Violent Predator law. This brief is submitted on behalf of Washington and the other named amici by their Attorneys General. Accordingly, consent to its filing is not required. Sup. Ct. R. 37.5.

The Kansas Sexually Violent Predator law provides for the civil commitment of persons with a proven history of criminal sexual violence who suffer from a "mental abnormality or personality disorder" which makes them likely to commit predatory acts of sexual violence. Washington State was the first state in the nation to enact a Sexually Violent Predator Statute and the Kansas law is closely modeled on Washington's Statute. In addition to Washington and Kansas, four other states -- Wisconsin, Minnesota, California and Arizona -- have adopted similar laws.[1]

The Washington State Supreme Court upheld the constitutionality of Washington's Sexually Violent Predator Statute in *In re Young*, 122 Wn.2d 1, 857 P.2d 989 (1993). The Statute was subsequently struck down on substantive due process, double jeopardy and ex post facto grounds in *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995).[2]

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[1]To date, six states have enacted sexually violent predator laws: Kan. Stat. Ann. § 59-29a01 *et seq.*; Wash. Rev. Code § 71.09 *et seq.*; Wis. Stat. Ch. 980; Minn. Stat. § 253B.02, subd. 18b; Cal. Welf. & Inst. Code § 6600 *et seq.*; and Ariz. Rev. Stat. § 13-4601-4609 (effective July 20, 1996).

[2]The district court granted the State's motion for a stay of its decision pending appeal by the State to the Ninth Circuit.

The State of Washington has appealed this decision to the Ninth Circuit Court of Appeals, and oral argument was heard on March 7, 1996. Currently, 36 persons are detained under Washington's Sexually Violent Predator law. As such, Washington State has a substantial interest in any litigation pertaining to the constitutionality of this Statute or others like it.

In addition to Washington, amici Wisconsin, California and Arizona have enacted laws which are substantially similar to the Statute at issue here. Certain of the amici are, as well, considering introducing similar laws. All of the amici share a common interest in protecting their citizens from sexually dangerous persons.

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES A FUNDAMENTAL QUESTION REGARDING THE NATURE AND EXTENT OF THE STATES' POWER TO DEFINE THE MENTAL CONDITION REQUIRED FOR CIVIL COMMITMENT OF DANGEROUS SEXUAL PREDATORS.

This case presents the question of whether Kansas' Sexually Violent Predator Statute comports with substantive due process. At the core of this question is the fundamental issue of whether the State, within reasonable limits, has the power to identify and define those mental conditions which, when combined with a showing of dangerousness, permit the State to civilly commit an individual for the safety of others or whether the State, in fashioning such a definition, is restricted to a specific or "medical" definition of the term "mental illness."

To date, five courts have considered this question. Three courts -- the Washington State Supreme Court, the Wisconsin State Supreme Court and the Minnesota Court of Appeals -- have upheld statutes substantially similar to

Kansas' Sexually Violent Predator Statute and have held that the language of those statutes ensures that persons committed pursuant to their terms have mental conditions satisfying the requirements of substantive due process. *In re Young*, 857 P.2d 989; *State v. Post*, 197 Wis. 2d 279, 541 N.W. 2d 115 (1995); *In re Linehan*, 544 N.W. 2d 308 (Minn. Ct. App. 1996).[3] Two others -- the United States District Court for the Western District of Washington and the Kansas State Supreme Court -- have concluded that those States' Sexually Violent Predator Statutes, by defining a sexually violent predator as a person suffering from a "mental abnormality[4] or personality disorder" which makes that person likely to engage in predatory[5] acts of sexual violence, fail to meet the requirement that civilly committed persons be "mentally ill." *Young v. Weston*, 898 F. Supp. 745; *In re the Care and Treatment of Leroy Hendricks*, 912 P.2d 129 (Kansas 1996) (the subject of the present petition).

The question of the States' authority to define the mental condition required for civil commitment, together

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[3]A petition for a writ of certiorari in the *Post* case is currently pending before this Court, docket no. 95-8204. Review of the *Linehan* decision was granted by the Minnesota Supreme Court on March 19, 1996.

[4]Mental abnormality is defined in the Kansas Statutes Annotated as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." Kan. Stat. Ann. § 59-29a02(b).

[5]Kansas' and Washington's statutes require that the future acts of sexual violence be "predatory" in nature; Wisconsin's does not. *See* Kan. Stat. Ann. § 59-29a02(a); Wash. Rev. Code § 71.09.020(1); Wis. Stat. Ch. 980.01(7).

with the broader question of the States' power to protect their citizens from persons with a proven history of sexual dangerousness through incapacitation and treatment, urgently requires resolution by this Court. Currently, five states have enacted statutes similar to Kansas' Sexually Violent Predator Statute, and numerous other states are considering such legislation. The five courts which have considered this issue have reached conclusions which cannot be reconciled with one another and leave state legislatures with no real guidance regarding the steps which they are constitutionally permitted to take to protect their citizens from dangerous and mentally disordered sex offenders. These States require guidance from this Court regarding this issue.

II. THE SUPREME COURTS OF WASHINGTON AND WISCONSIN HAVE DETERMINED THAT THEIR STATES' STATUTES SATISFY SUBSTANTIVE DUE PROCESS.

The Washington State Supreme Court was the first court in the nation to consider a sexually violent predator statute. That court, by a 6-3 majority, upheld the Statute's constitutionality against challenges on equal protection, ex post facto, double jeopardy, procedural due process and substantive due process grounds. *In re Young*, 857 P.2d 989. The court soundly rejected the argument that Washington's Statute permitted the State to hold individuals without proving that those persons are both mentally ill and dangerous.

The Statute, the court noted, uses the terms "mental abnormality or personality disorder" to describe that mental pathology required for commitment. While observing that the term "mental abnormality" is not defined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (3rd ed. rev. 1987)

(hereinafter cited as DSM-III-R),[6] the court found that the legislature has given that term a meaning "which incorporates a number of recognized mental pathologies." *Id.*, 857 P.2d at 1001.[7] "What is critical for our purposes," the court wrote:

> is that psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM.

Id. citing Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. Puget Sound L. Rev. 709, 733 (1991-1992).

The Washington State Supreme Court squarely rejected the argument that the term, because it was coined

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[6]The DSM-III-R was superseded in May 1994 by the publication of the DSM-IV.

[7]Both Young and Cunningham had been diagnosed with a mental disorder known as a "paraphilia." *In re Young*, 857 P.2d at 1002. Paraphilias are characterized by recurrent intense sexual urges and sexually arousing fantasies generally involving either (1) nonhuman objects, (2) the suffering or humiliation of oneself or one's partner (not merely simulated), or (3) children or other nonconsenting parties. DSM-III-R at 279. Both Cunningham and Young targeted adult females and as such were specifically diagnosed as suffering from Paraphilia Not Otherwise Specified: Rape. *In re Young*, 857 P.2d at 1002. Hendricks has been diagnosed as suffering from pedophilia. Pet. 3a. Pedophilia (DSM-IV 302.2) involves intense, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with prepubescent children. In order to be diagnosed as Pedophilia, these urges, fantasies or behaviors must cause clinically significant distress or impairment in social, occupational or other important areas of functioning, and must have persisted for a period of at least six months. DSM-IV at 528.

by the legislature rather than the mental health community, did not describe a true mental illness. Noting that "over the years, the law has developed many specialized terms to describe mental health concepts" (*Id.* at 1001-1002, fn 5), the court pointed out that, according to expert testimony at trial, the statutory term "mental abnormality" was nearly identical to the notion of "mental disorder" as defined in the DSM-III-R. *Id.*

Two years later, the Wisconsin State Supreme Court upheld that State's Sexually Violent Person Statute. Rejecting the argument that the legislature, by targeting those with a "mental disorder that makes it substantially probable that the person will engage in acts of sexual violence"[8] (Wis. Stat. Ch. 980.01(7)), intended the Statute to apply to those who are not mentally ill, the court noted that "there is no talismanic significance that should be given to the term 'mentally ill.'" *State v. Post*, 541 N.W. 2d at 122. The United States Supreme Court, noted the Wisconsin court, had never enunciated a single definition "that must be used as the mental condition sufficient for involuntary mental commitments" (*Id.* at 123), and had itself used numerous terms to describe the mental condition of those properly subject to civil commitment.[9] *Id.* The various definitions of "mental illness" in Wisconsin's and

[8]Pursuant to Wis. Stat. Ch. 980.01(2), "mental disorder" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence."

[9]*See, for example, Addington v. Texas*, 441 U.S. 418, 425-26 (1979), discussing "the state's interest in committing the *emotionally disturbed* (emphasis added) and "the expanding concern of society with problems of *mental disorders*" (emphasis added).

other states' laws serve, the court noted, "a legal, not a medical function," adding that:

> Even the primary tool of clinical diagnosis in the psychiatric field, the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), warns of a significant risk of misunderstanding when descriptions designed for clinical use are transplanted into the forensic setting.

Id.

This view is echoed by the three dissenting Justices of the Kansas State Supreme Court:

> There is no justification for linking constitutional standards to the shifting sands of academic thought reflected in the DSM-IV and its frequent revisions. "The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability termination, and competency." DSM-IV, Cautionary Statement, xxvii. *In light of the DSM-IV's purpose and design, it would be misguided to rely on it as a source of constitutional limitation on legislative power.*

Hendricks, 912 P.2d 129 (Kansas 1996), Pet. 44a-45a (emphasis added).

The key to the constitutionality of the definition of mental disorder, the Wisconsin State Supreme Court wrote, is that it requires a nexus between the disorder with which the individual is diagnosed and the predisposition to engage in acts of sexual violence. *Post*, 541 N.W. 2d at 124.

Citing *Addington*, the court noted that "[t]he essence of federalism is that the states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Id.* at 123 citing *Addington*, 441 U.S. at 431. The court then continued:

> Particularly when a legislature undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.

Post, 451 N.W. 2d at 123, citing *Jones v. United States*, 463 U.S. 354, 370 (1983), citing *Marshall v. United States*, 414 U.S. 417, 427 (1974). The court concluded that the Statute was narrowly tailored to target only the most dangerous of sex offenders and as such, did not violate substantive due process. *Post*, 541 N.W. 2d at 124.

III. THE SUPREME COURT OF KANSAS AND THE DISTRICT COURT OF WASHINGTON HAVE ERRONEOUSLY CONCLUDED THAT KANSAS' AND WASHINGTON'S SEXUALLY VIOLENT PREDATOR STATUTES FAIL TO SATISFY A CONSTITUTIONAL REQUIREMENT OF "MENTAL ILLNESS."

The Supreme Court of Kansas, and the federal district court for the Western District of Washington before it, have both invalidated those States' Sexually Violent Predator Statutes. Based in large part on a narrow and formalistic reading of this Court's statements in *Foucha v. Louisiana*, 504 U.S. 71 (1992), requiring "mental illness" as a prerequisite for civil commitment there, both courts have erroneously concluded that the State Statutes in question permit the civil commitment of persons who are not "mentally ill" in a constitutional sense.

In *Young v. Weston*, the United States District Court began its substantive due process analysis with a discussion of Washington's Sexually Violent Predator Statute's legislative findings.[10] The legislature, the court concluded, by distinguishing sexually violent predators from persons subject to Washington's general civil commitment law, "expressly disavow[ed] the notion that the targeted group of persons are mentally ill." *Young v. Weston*, 898 F. Supp. at 749. The legislative findings indicate that persons in this targeted group "do not have a mental disease or defect that renders them appropriate for the existing Involuntary Treatment Act," and suffer from "antisocial personality features which are unamenable to existing mental illness treatment modalities." *Id.* This language, the court wrote, reveals the Washington

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[10]Those findings read as follows: The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing Involuntary Treatment Act, chapter 71.05 RCW, which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing Involuntary Treatment Act, chapter 71.05 RCW, is inadequate to address the risk to reoffend because these offenders do not have access to potential victims and, therefore, they will not engage in an overt act during confinement as required by the Involuntary Treatment Act for continued confinement. The legislature further finds that the prognosis for curing offenders is poor, the treatment needs of this population are very long-term, and the treatment modalities for this population are very different than the treatment modalities for people appropriate for commitment under the Involuntary Treatment Act. Wash. Rev. Code § 71.09.010.

legislature's "abandonment" of the mental illness requirement. *Id.*

That the Washington legislature did not intend to target those who are mentally ill, stated the court, is further evidenced by the Statute's use of the term "mental abnormality," a term "which has neither a clinically significant meaning nor a recognized diagnostic use among treatment professionals." *Id.* at 750:

> The legislature's decision to employ a term unrecognized in the psychiatric community, coupled with . . . a definition of no value to treatment professionals is an indication that the State did not intend the Statute to capture only the seriously mentally ill.

Id. fn 2. The court thus concluded that Washington's Statute was not designed to provide for the commitment of dangerous "mentally ill or mentally disordered persons." *Id.* Rather, the Statute targets persons with "antisocial personality features," a result prohibited by *Foucha*. *Id.* By failing to require that persons detained be mentally ill, the court wrote, "the Statute here permits indefinite incarceration based on little more than a showing of potential future dangerousness." *Id.* at 749.

Like the United States District Court, the Kansas State Supreme Court concludes that the legislative findings reveal an intent to distinguish sexually violent predators from the "mentally ill."[11] Sexually violent predators, unlike persons appropriate for commitment under that State's general civil commitment law, have "antisocial personality features" or a "mental abnormality." *Hendricks*, 912 P.2d 129 (1996), Pet. 17a. Noting that

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[11]For purposes of this analysis, the findings of both statutes are substantially identical.

these antisocial personality features are, according to the legislature's findings, "unamenable to existing mental illness treatment modalities" (Kan. Stat. Ann. § 59-29a01), the court reasoned that, "[i]f there is nothing to treat [under Kansas' general civil commitment law], there is no mental illness." *Id.* at 15a. Neither the language of the Act nor the State's evidence, wrote the court, supports a finding that "mental abnormality or personality disorder" constitutes a "mental illness" as defined in Kansas' general civil commitment statute. *Id.* As such, the Act does not satisfy the constitutional standard set out in *Addington* and *Foucha*. *Id.*

While the Kansas State Supreme Court does not propose a specific medical definition of mental illness, its opinion strongly suggests that any statutory definitions of mental illness must comport with such a model or, in the alternative, must use the words "mental illness." Criticizing the Washington State Supreme Court for a "selective and inconsistent use" of the DSM-III-R, the court strongly implies that, in order to qualify as a "mental illness" for substantive due process purposes, a mental pathology must be contained within that treatise. *See Id.* at 13a. Other language in the opinion, however, suggests that this constitutionally adequate model is expressed by the definition of mental illness contained in Kansas' general civil commitment law.[12] After reviewing the definition of

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[12]Pursuant to Kan. Stat. Ann. § 59-2902(h), a mentally ill person is any person who:

> (1) [i]s suffering from a severe mental disorder to the extent that such person is in need of treatment;
> (2) lacks capacity to make an informed decision concerning treatment; and
> (3) is likely to cause harm to self or others.

mental illness under Kansas' general civil commitment statute, the court concludes that:

> neither the language of the [Sexually Violent Predator] Act nor the State's evidence supports a finding that "mental abnormality or personality disorder" as used in 59-29a02(a) is a "mental illness" as defined in 59-2902(h). Absent such a finding, the Act does not satisfy the constitutional standard set out in *Addington* and *Foucha*.

Id. at 19a. In other words, if an individual is not suitable for commitment under Kansas' general civil commitment statute, he or she cannot be civilly committed on any other grounds under any other statute. The court thus appears to conclude that the requirements of substantive due process are embodied in existing Kansas State law. The court ignores, however, the fact that, while Kansas' general civil commitment statute does use the magic words "mental illness," the statutory definition of that term bears no resemblance to any definition contained in the DSM.[13]

IV. THIS CASE PRESENTS A FUNDAMENTAL QUESTION OF SUBSTANTIVE DUE PROCESS THAT REQUIRES RESOLUTION BY THIS COURT.

The field of mental health is clearly one which is "fraught with medical and scientific uncertainties." *Marshall*, 414 U.S. at 427. "Psychiatry is not . . . an

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[13]The DSM-IV does not use or define the term "mental illness." "Mental disorder" is defined as a "clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom. DSM-IV at xxi.

exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness." *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985). The power of the states to act to protect their most vulnerable citizens should not, however, depend upon "research conducted in the scientific community." *Jones v. United States*, 564 U.S. 354, 364, fn 13 (1983). As has been demonstrated in Washington, Wisconsin, California, Kansas and Minnesota, mental health professionals are able, using definitions crafted by their States' legislatures, to identify mental pathologies which predispose particular sex offenders to commit further sexually violent acts. Two courts have, however, by narrowly focusing on either terminology or definitions provided in the DSM, invalidated these Statutes, concluding that they permit the detention of persons not "mentally ill."

The question of the States' authority to define that mental condition required for civil commitment, together with the broader question of the States' power to protect its citizens from persons with a proven history of sexual dangerousness through incapacitation and treatment, urgently requires resolution by this Court. Not only those five states which have enacted statutes similar to Kansas' Sexually Violent Predator Statute, but the numerous other states which are considering such legislation urgently require guidance from this Court regarding this issue.

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CONCLUSION

For the foregoing reasons, Washington and the other named amici respectfully request that this Court grant the State of Kansas' Petition for a Writ of Certiorari.

Respectfully submitted,

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(5)

Nos. 95-1649, 95-9075

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

STATE OF KANSAS,

Petitioner,

v.

LEROY HENDRICKS,

Respondent.

LEROY HENDRICKS,

Cross-Petitioner,

v.

STATE OF KANSAS,

Cross-Respondent.

On Writ Of Certiorari
To The Supreme Court of The State Of Kansas

JOINT APPENDIX
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PETITION: *STATE V. HENDRICKS* (8/17/94)

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
PROBATE DEPARTMENT

IN THE MATTER OF THE CARE AND TREATMENT OF Leroy V. Hendricks, Respondent	CASE NO. 94P 964 (Filed Aug. 17, 1994)

PURSUANT TO KANSAS STATUTES ANNOTATED 59-29(a)01 et seq. (1994 SESSION LAWS)
An Act concerning person who commit sexually violent offenses.

PETITION

COMES NOW Petitioner, State of Kansas, by and through its attorney, NOLA FOULSTON, District Attorney for the Eighteenth Judicial District, and for its cause of action herein alleges and states as follows:

1. Petitioner Nola Foulston is the duly elected, qualified and acting District Attorney for the Eighteenth Judicial District, Sedgwick County, Kansas.

2. Respondent, Leroy V. Hendricks, whose present address is Hutchinson Correctional Facility, Hutchinson, Kansas, is presently confined in the custody of the Kansas Department of Corrections.

3. This action is brought pursuant to Kansas Statutes Annotated 59-29(a)01 et seq. (1994 Legislative Session Senate Bill 525), an act concerning persons who commit sexually violent offenses.

4. By written notice received on the 6th day of July, 1994, within forty-five days of the filing of this petition, Kansas Department of Corrections, the agency with jurisdiction, has certified that respondent, Leroy V. Hendricks, may meet the criteria of **a sexually violent predator** as defined by statute, to wit:

(a) That on the 26th day of November, 1984 respondent Leroy V. Hendricks was convicted in the Eighteenth Judicial District, District Court, Sedgwick County, Kansas, Case No. **84CR 1463** of a sexually violent offenses involving two victims as defined by law, to wit: **K.S.A. 21-3503 Indecent Liberties with a Child; and K.S.A. 21-3503 Indecent Liberties with a Child; and has a history of prior sexual offenses from other jurisdictions, to wit: 1960 Spokane, Washington, Indecent Liberties with a Child; Seattle, Washington (1963 and 1967) Indecent Liberties with a Child (two separate cases).**

(b) That Respondent is anticipated to be released from total confinement on the 11th day of September, 1994.

(c) That sufficient evidence exists to determine that respondent suffers from a mental abnormality or personality disorder which makes him likely to engage in predatory acts of sexual violence directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization.

WHEREFORE, petitioner requests that respondent be taken into custody by the Sheriff of Sedgwick County and

transferred to an appropriate facility; that the court set a hearing date not later than 5:00 p.m. of the second full day the District Court is open for the transaction of business after the filing of this petition to determine whether probable cause exists to believe that respondent is a sexually violent predator; that counsel be appointed for respondent; that if probable cause is shown, that respondent remain in custody and be transferred to an appropriate facility for evaluation as to whether he is a sexually violent predator; and if such finding is made, for a trial by jury on the issues; and if found to be a sexually violent predator beyond a reasonable doubt, that respondent be committed to the custody of the Department of Social and Rehabilitation Services in a secure facility for control, care and treatment until such time as his mental abnormality or personality disorder has so changed that he is safe to be at large; for evaluation and costs of this action to be paid by the Department of Social and Rehabilitation Services; and, for such other and further relief as the court deems just and proper.

/s/ Nola Foulston
PETITIONER

STATE OF KANSAS)
) SS:
COUNTY OF SEDGWICK)

Petitioner, of lawful age, being first duly sworn upon oath states that affiant is the petitioner above-named who has read the above and foregoing petition and who is familiar with the contents thereof, and that the statements

therein made are true and correct to the best of her knowledge and belief.

/s/ Nola Foulston
PETITIONER

SUBSCRIBED AND SWORN to before me this 17th day of August, 1994.

/s/ L. Jeanette Clary
Notary Public

L. JEANETTE CLARY
NOTARY PUBLIC
STATE OF KANSAS
My Appt. Exp. 11-9-96

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
PROBATE DEPARTMENT

IN THE MATTER OF THE CARE AND TREATMENT OF Leroy V. Hendricks, Respondent	)	CASE NO. 94P 964 (Filed Aug. 17, 1994)

PURSUANT TO Kansas Statutes Annotated 59-29(a)01 et seq. (1994 Session Laws)
An Act concerning person who commit sexually violent offenses.

MOTION FOR PROBABLE CAUSE HEARING

COMES NOW petitioner, State of Kansas, by and through its attorney, Nola Foulston, District Attorney for the Eighteenth Judicial District and respectfully moves the court, pursuant to K.S.A. 59-29(a)01 et seq. for a probable cause hearing on the determination as to whether respondent is a sexually violent predator; and for appointment of counsel to represent respondent in this action.

Petitioner requests that the probable cause hearing be scheduled not later than 5:00 p.m. of the second full day the District Court is open for the transaction of business after the filing of this petition on the 17th day of August, 1994 to determine whether probable cause exists.

Respectfully submitted,

/s/ Nola Foulston
Nola Foulston, District Attorney
Attorney for Petitioner
Supreme Court Number 09175

DISTRICT COURT'S ORAL RULING ON MOTION TO DISMISS AND RESERVING RULING ON CONSTITUTIONAL ISSUES (TRANSCRIPT OF PROCEEDINGS OF 8/19/94)

* * *

[p. 10] THE COURT: First of the all, on the matter raised as to the sufficiency of the petition, it appears to me that under what I'll call the act – and when I'm referring to the act, I'm referring to Chapter 316 of the 1994 Session Laws. And under the act it would appear that the allegation found in the petition filed in the instant case in paragraph 4, alleging a violation in the case that was numbered 84 CR 1463 in this judicial district, is sufficient as that is a specific reference found in Section 2 of the act, in particular at (e)(2) where it says, "indecent liberties with a child as defined in K.S.A. 21-3503 and amendments thereto." That makes the petition sufficient in my mind bringing it specifically – to bring this matter specifically within the act.

As to service, I'm going to find that the service upon Mr. Hendricks today, coupled with the service on his lawyer on Wednesday last past, is sufficient service. I'm finding his motions are not premature, since he's liable to be subject to the act and is indeed subject to it but under the provisions of it might be deprived of his [p. 11] liberty.

As to the constitutional issues – and they were set out very well by Mr. Weilert in the particulars – I'll reserve any opinion as to the constitutional issues of the act itself and parts thereof.

As to whether or not the State of Kansas is bound by its contract originally entered, interesting argument. No question at all about the State of Kansas being bound by contracts it enters into. In this particular case, can the Legislature then come along and mandate an action by the D.A. which is contrary to that that's been established by law? I'm going to reserve ruling on it and give the District Attorney time to talk about it in a brief or have whatever the lawyers wish to do in that regard done.

I'll allow the State to proceed and see if they can present evidence here that would show probable cause to believe that Mr. Hendricks is under the act and that he ought to be examined so that a jury or a judge can make a ruling or a finding of their own.

Preliminary matters. Mr. Weilert, did you want to make an opening statement?

MR. WEILERT: No, Your Honor.

THE COURT: Call your first witness, please.

MS. BARNETT: State calls Harvey Russell to the stand.

* * *

TESTIMONY OF DAN CRASK
(SPECIALIST CLINICAL SOCIAL WORKER)
IN PROBABLE CAUSE HEARING
(TRANSCRIPT OF PROCEEDINGS OF 8/19/94)

* * *

[p. 25] MR. WEILERT: State's offering it, Your Honor.

THE COURT: Did you want to puruse it?

MR. WEILERT: Yeah, please.

THE COURT: Okay, why don't you make cursory examination. If you think you need more time, tell me and we'll take a little recess so you can at least make a preliminary examination. I don't want to hurry you.

MR. WEILERT: I don't have any further need of the file, Your Honor.

THE COURT: Thank you very much sir. Just take your file. Thank you for your evidence. Call your next witness, Ms. Barnett.

MS. BARNETT: Your Honor, the State calls Dan Crask to the stand.

THE COURT: Mr. Crask, come right up here, please, sir. This lady will administrator an oath to you.

DAN R. CRASK,

called as a witness on behalf of the State, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. BARNETT:

Q. Please state your name for the Court.

A. It's Dan Crask.

Q. What is your occupation?

A. I'm a licensed specialist clinical social worker.

[p. 26] Q. What does that mean?

A. I've been granted a license by the State of Kansas to practice clinical social work in this state.

Q. What does it mean to practice clinical social work?

A. I assess, diagnose and treat individuals with a variety of adjustments and mental and personality disorders.

Q. What type of formal education have you had to prepare you to do that?

A. I received a Bachelor's in Social Work from Tabor College in 1982. I received a Master's in Clinical Social Work from the University of Kansas in 1989, and I received – after I received my master's, I did a two-year supervision period and took a test and passed a test to obtain my license for specialist clinical social work status.

Q. And within that type of education that you received, did you specialize in any particular area or is that just kind of a broad area that you studied in?

A. It's rather broad.

Q. Now, since you received your formal education have you had – received any training or seminars, things of that nature?

A. Yes, I have.

Q. And what would those be?

A. I have received many seminars. Some of them include – I attended a conference in March of 1994 on treating sexual [p. 27] abusers here in Wichita put on by Tim Kahn out of the State of Washington, approximately 12-hour conference; attended a conference – National Conference on Managing Abusive Sexuality in Chicago in 1991. I have attended Nicholas Groth's conference on working with sex offenders. I have attended Dennis Dailey's conference on working – on assessing sexual offenders and a variety of others.

Q. Have you yourself ever participated in training other people in the area of sexual assault or sexual abuse?

A. Yes, I have.

Q. How and where?

A. I – in 1991 I participated in a training for the sexual abuse treatment provider – approved list of treatment providers for Sedgwick County Mental Health and trained folks on – anyone who need – who wishes to be on that list has to attend trainings, and I presented at the training in 1991 for folks to become approved treatment providers for Sedgwick County Mental Health.

Q. Since receiving your degrees, what have you done as far as your profession or occupation?

A. Well, of course, I practice. When I was – when I first was employed with a master's, I worked at Family Consultation Service treating a variety of folks, concentrating mostly on sexual offenders and sexual abuse victims, children and adolescents. I've continued that [p. 28] work into my private practice. I currently conduct groups for sexual offenders. I conduct individual training for both adolescent sexual offenders and adult sexual offenders. I conduct individual and occasionally group sessions for sexual abuse victims. I'm involved with – in family sessions for those kinds of things. I'm also on the Board of the Wichita Area Sexual Assault Center. I am also active in the task force – a local task force for the sexual abuse – I think it's called the Sexual Abuse Treatment Task Force that is trying to devise standards for treatment and unify treatment practices for sexual offenders and sexual abuse victims also for the State of Kansas.

Q. Have you ever participated in the investigation of sexual assault cases?

A. Yes. I was also employed at the Exploited and Missing Children's Unit from 19 – from its inception, which I believe was 1985 or – '84 or '85 – I can't remember – until 1987, when I returned to graduate school, investigating cases of child sexual abuse. Also did some of that prior, worked for Child Protective Services prior to that for three years investigating child sexual abuse cases and some runaway cases in a variety of other child physical abuse cases and neglect cases.

Q. Now as a clinical social worker working with victims of [p. 29 sexual assaults or sex offenders, what is it that you do for them?

A. Try to assess their need for treatment and provide them with appropriate recovery and treatment from their trauma or mental disorder.

Q. And how do you assess their problems or their treatment needs?

A. A variety of things are included in assessments. Psychological testing is obviously included in assessment of sex offenders, and I read a variety of psychological tests that may be provided by other folks. Reports from victims is important in the assessment process, reports from the police department, perpetrator statements during those events. For sexual abuse victims, same, similar reports of the trauma that may have occurred to them, changes in functioning, all those kinds of things figure into the assessment as well as personal interviews with the folks.

Q. Now, as part of your assessment do you diagnose people or determine if they have a personality disorder or mental disorder of some type?

A. Yes.

Q. And do you do that in much the same way as you just described.

A. Yes.

[p. 30] Q. Now, you indicated that you look at psychological evaluations or testing. Do you yourself perform those?

A. No, I do not.

Q. But it is part of your job to actually look at the data that comes from that and then make an assessment based upon that data?

A. Very seldom do I make as assessment based on the testing data itself. I typically look at reports generated by the data from the practitioners who are generating reports and make an assessment and diagnostic criteria based on those reports but not necessarily on the data itself. I don't get scores and numbers on MMPIs and things like that.

Q. Okay. How many sex offenders would you say that you've worked with?

A. Several hundred. I don't know the exact number. I currently have probably twenty-five in treatment on an ongoing basis at this time.

Q. And that's sex offenders?

A. Sex offenders.

Q. Mr. Crask, I would like to ask you if you're familiar with records or if you've been provided some records on an individual by the name of Leroy V. Hendricks with a date of birth of 9-27 of '34?

A. Yes, I have.

Q. What records have you been provided?

[p. 31] A. With Mr. Hendricks I received a copy of a petition filed in this court, petition that we're here on currently. I received a Notification of County – to the County/District Attorney of convicted sexually violent

offense. I received an SRDC report that includes an Evaluation Summary, a Psychological Report, a Report of Clinical Evaluation dated February 28th, 1985. I received a report of a Psychiatric Evaluation by Leonel Urdaneta, M.D. I received a face sheet to the Presentence Snvestigation [sic] and – the subsequent investigation, I should say, and then I also have a copy of a – I have a second copy of the same material.

Q. Are you familiar with diagnostic criteria set out in the DSM-IV?

A. Yes, I am.

Q. What is the DSM-IV, for the record?

A. DSM-IV is the American Psychiatric Association's diagnostic manual for mental disorders.

Q. Would that include personality disorders?

A. Personality disorders and mental disorders, yes, and adjustment disorders and some family disorders. There's adjustment disorders and family V-code type information in it.

Q. In your opinion, based upon looking at the records under the name of Leroy V. Hendricks, do they indicate that that [p. 32] person meets the diagnostic criteria for any of the mental and/or personality disorders as defined by the DSM-IV-R?

MR. WEILERT: Your Honor, I object at this time. The prosecution is asking for an opinion from Mr. Crask, and he's already said that the only information he has basically is from 1985, and we're talking about a situation where we're asking an opinion about his – Mr.

Hendricks' condition today. If I may voir dire, I believe the witness will testify that's impossible.

THE COURT: I'll allow you to voir dire on the point of whether or not he's qualified to render an opinion.

MR. WEILERT: On that information?

THE COURT: On that information.

VOIR DIRE EXAMINATION

BY MR. WEILERT:

Q. Mr. Crask, you said that the reports you received are dated from 1985?

A. Correct.

Q. Is it – what you're telling us is that, based upon testing done nine and a half years ago, you can render an opinion on the condition of a person today?

A. On some diagnoses, yes.

Q. And what are those diagnoses?

A. Some of them would be antisocial personality – or [p. 33] personality disorders, which tend not to change over periods of time, and sexual disorders such as pedophilia.

Q. Sir, in your practice is it common for you to retest persons or have persons retested every six months to a year or two years?

A. Yes, it is.

Q. And why do you do that?

A. To update information as far as progress or to validate prior diagnoses.

Q. Well, doesn't that, in effect, mean that the information ages and is no longer as valid as it may have once been?

A. It can mean that under a variety of circumstances. Certainly other issues – a lot of issues can have growth or outgrowth. Certainly all the childhood disorders and things like that tend to have changes over periods of time. Some of the disorders do not tend to have as much change over a period of time.

Q. So you say don't have – tend to have as much change. They do change, don't they?

A. They potentially can.

Q. So you can't say here today whether or not the person whose records you have evaluated has changed or not, can you?

A. Due to the criteria of diagnosis that this person meets, I can give you a relatively assured response because of that [p. 34] diagnosis – that because of that diagnosis that he tends to fall under, that it will not have changed.

Q. You could not give us an opinion based upon a reasonable degree of medical or psychological certainty, though, can you?

A. Well, I believe that I can, yes, under – for this circumstance especially.

Q. Okay. You said that in – you have not conducted any personal interviews with this person, have you?

A. Correct.

Q. Isn't it correct that in the Diagnostic and Statistical Manual that you're referring to that it says in the diagnostic features relating to personality disorders that "Although a single interview with the person is sometimes sufficient for making the diagnosis, it is often necessary to conduct more than one interview and to space these over time."

A. Can you refer me to –

Q. Page 630 under "Diagnostic Features," the second paragraph, sir.

A. I am sorry, which paragraphs?

Q. Under the heading "Diagnostic Features."

A. I have that.

Q. The second paragraph, the 7th line, starting with "Although."

[p. 35] A. It does state that, yes.

Q. So doesn't a reasonable reading of that indicate that, in order to make the diagnosis under DSM-IV regarding personality disorders, a – at least one personal interview is required?

A. The entirety of that paragraph suggests that the diagnosis of the personality disorder requires an evaluation of the individual's long-term patterns of functioning. The particular personality features must be evident by

early adulthood. That requires information to be obtained, typically, through records, and the DSM-III-R or DSM-IV indicates that with antisocial personality disorder that you do need to get collaborating evidence to make that diagnosis.

Q. Doesn't it go on to say – and I have read it before – "Although a single interview with the person is sometimes sufficient for making the diagnosis, it is often necessary to conduct more than one interview and to space these over time"? Doesn't that indicate to you, sir, that a personal interview is necessary, at least one?

A. If I – if I were required to make a full diagnosis of this person, it would probably require that to be done.

Q. Sir, do you realize that what your testimony here today is doing is subjecting this person to a denial of his liberty?

[p. 36] MS. BARNETT: I'm going to object to the form of that question as argumentative, Your Honor.

THE COURT: I'll sustain.

BY MR. WEILERT:

Q. Do you realize, sir, that what you are being asked to do today is to tell the Court whether or not this person is a violent sexual predator?

A. No, that is not what I'm being asked to say.

Q. Okay. What do you think you're being asked to say?

A. I'm being asked to say whether or not this person's behavior characteristics fit within the criteria for a

diagnosis of pedophilia or antisocial disorder or some sort of mental disorder. I am not – and if there's reason to believe that that could be true. I am not trying to determine whether this person is a predator or should be put away for a period of time. I'm assuming there's an evaluation process that will determine that cause of action, not my testimony.

Q. Okay. In making your – or coming up with this opinion that you say you have, did you rely to any extent on the allegations in the petition regarding this person's prior criminal history?

A. Yes, to some extent.

Q. How much?

A. It is one of the – it is one of the factors that [p. 37] contributes to his diagnosis. I don't know how to differentiate if it's twenty percent of eighty percent.

Q. If those allegations of prior criminal history, prior criminal convictions were not accurate or were not proved, would that change your opinion?

A. No, it would not. It would not change my – it would not change the fact that he tends to meet criteria for a diagnosis of pedophilia, no.

MR. WEILERT: Your Honor, probably I'm getting beyond the point of the voir dire. I don't believe – Well, I have some more questions.

BY MR. WEILERT:

Q. Mr. Crask, do you accept the Diagnostic and Statistical Manual, Volume IV as an authoritative source regarding the diagnosis of mental disorders?

A. It's an authoritative guide to the diagnosis of mental disorder, yes.

Q. And would you agree that in order to – when you are rendering an opinion regarding Mr. Hendricks, you are, in fact, making a diagnosis?

A. I am – I am indicating that the behaviors that I have read and observed in the evaluations indicate a diagnosis, yes.

Q. In order to make a diagnosis under the Diagnostic and Statistical Manual, Volume IV, or revision IV, do you [p. 38] agree that it says a personal interview is required?

A. It does not say a personal interview is required. I will agree that it does say that a single interview is not – "Although a single interview with the person is sometimes sufficient for making the diagnosis, it is often necessary to conduct more than one interview. . . . "

MR. WEILERT: Your Honor, I don't have any other questions at this time. I would suggest to the Court that Mr. Crask is, however the semantics come out, making a diagnosis that Mr. Hendricks has a personality disorder or a mental abnormality and that he has done that based upon information which is stale and without the benefit of a personal interview. I would suggest that the language we have discussed from the Diagnostic and Statistical Manual indicates that a personal interview is necessary to make such a diagnosis and, therefore, his opinion should not be allowed, and it is without proper foundation.

THE COURT: Thank you. I'll overrule the objection as to foundation.

MS. BARNETT: Thank you, Your Honor.

DIRECT EXAMINATION (Resumed)

BY MS. BARNETT:

Q. Do you recall my question that I asked?

A. No, I don't.

Q. All right. In your opinion, do the records that you've [p. 39] reviewed with regard to Leroy V. Hendricks indicate that this person meets diagnostic criteria for an of the mental and/or personality disorders as defined in DSM-IV-R?

A. Yes.

Q. And what would that be?

A. Pedophilia.

Q. And why do you diagnose or why do you indicate that that would be the diagnostic criteria or the personality disorder that Leroy V. Hendricks fits into?

A. Criteria for a diagnosis of pedophilia states – has three primary areas: A, that the person has to have, over a period of at least six months, recurrent and intense sexually arousing fantasies, sexual urges or behaviors involving sexual activity with a prepubescent child or children, general age 13 years or younger. He meets that criteria according to the information contained in the reports I have read. B, the fantasies, sexual urges or

behaviors cause clinically significant distress or impairment in social, occupation or other important areas of functioning. His incarceration meets that requirement. And, C, the person is at least 16 years of age and at least five years older than the child or children in Criterion A. So he meets the criteria according to the information contained in the information that I read.

[p. 40] Q. In reviewing that information which you have outlined for us, is it your impression from – that someone who has drafted those documents had a person-to-person interview with a Leroy Hendricks?

A. No. I am sorry. Which, the criteria?

Q. No, no. I'm talking about the reports that you reviewed.

A. Yes.

Q. Is it your impression that whoever drafted those reports, that they did so upon an interview with Leroy Hendricks?

A. Yes.

Q. Have you worked with people who you diagnosed or assessed as being pedophiles?

A. Yes.

Q. And do people, in your opinion, who are assessed as being pedophiles or suffering from pedophilia pose a risk to the community?

A. Yes.

Q. In what way?

A. Pedophilia is a act that, through research, we know has a certain amount of recidivism to it. People with sexual orientation, sexual arousal on children tend to act on that over periods of time. They may stop that behavior occasionally after incarcerations and so forth, but they tend to repeat that behavior over time.

Q. Why is that?

[p. 41] A. Sexual – deviant sexual arousal types of things like pedophilia tend to be somewhat gratifying for folks, and it has an internal mechanism, reinforcement mechanism where if they act on a sexual event or they have sexual fantasies about an event, they receive some sort of stimuli from that, and it tends to reinforce itself just on a behavioral-type level.

Q. Now, I believe that you've gone through this a little bit in the voir dire portion of your examination, but let me just ask you. Does the age of this information in any way affect your belief or your opinion that this person fits into the personality disorder of pedophilia?

A. The age of this information does not impact – does not make me feel that he would not fit into that, no.

Q. What if hypothetically I were to say that the person that you see outlined in those reports under the name of Leroy V. Hendricks has served a significant period of time in a penal institution incarcerated without receiving any type of treatment or therapy for sex offenders in this area. How would that affect your opinion with regard to whether a person has gotten over this personality disorder?

A. It would be my opinion that that person would be likely to continue with a diagnosis of pedophilia actually regardless of whether he had treatment or didn't have treatment.

[p. 42] Q. All right. And sticking with that same hypothetical situation, what would your opinion be about the risk of that person if they were to be released into society?

A. A person who did not have treatment is certainly at a much higher risk to reoffend than a person who does have treatment.

MS. BARNETT: May I have just a moment, please, Your Honor?

THE COURT: Yes.

MS. BARNETT: Thank you. Your Honor, I have no further questions at this time.

THE COURT: Thank you. Cross-examination, Mr. Weilert.

MR. WEILERT: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. WEILERT:

Q. Mr. Crask, are you calling pedophilia a personality disorder?

A. No, I'm not.

Q. Okay. But Ms. Barnett in her questioning asked you about personality disorders, and you said pedophilia; is that not correct?

A. It's not my interpretation of the questioning that was asked to my – or that I answered.

Q. Okay. So pedophilia is not a personality disorder, is it?

[p. 43] A. Pedophilia is a mental disorder.

Q. Not a personality disorder?

A. Correct.

Q. Okay. Now, in the field of social work or psychology, is there such a thing as a – let me get the words right here – mental abnormality?

A. I suppose that word is used in a variety of different ways.

Q. What does mental abnormality mean to you as a licensed specialized clinical social worker?

A. I would have to know the usage of the word in a context, I believe.

Q. So it has no meaning, as far as you're concerned from a professional standpoint, no specific –

A. Well, it can have meaning but I'm – in and of itself –

Q. You can't tell the judge what mental abnormality means, can you?

A. No. I couldn't

Q. In reaching your opinion that the person referred to in this report is a pedophilia – or pedophile, you said that be meets the criteria set out in the Diagnostic and Statistical Manual, and that's on page 528.

A. And that's why I would say that this person suffers from a pedophilia – a sexual disorder of pedophilia, not that he is necessarily a pedophile.

[p. 44] Q. But the criteria you used, are those set out on page 528 of the manual?

A. Yes, they are.

Q. Other than the information contained in the petition and – pardon me, I'm talking about under subsection A, that criterion. Other than the information contained in the criteria – pardon me, in the petition, what information did you have that allows you to say that this person referred to in this report meets Criterion A?

A. Okay. There's several pieces. In the psychological report, the reporter indicates that Mr. Hendricks stated or realized that his sexual preference is for young boys and girls and that it is illegal to act on those impulses. He has tried to be discreet, choosing children he did not know and where he would not be seen.

Q. Okay. And that is a report – just so I'm getting it right, that's something that Mr. Hendricks allegedly told a –

A. Marta Howe, a psychologist. In February of 1985, she reported this information.

Q. '85?

A. Correct. There are other things. It is noted in this report that the inmate discussed his maladaptive sexual involvement with young children with absolutely no remorse, implying that the children have enjoyed it or

[p. 45] invited his involvement and that no negative consequences would be suffered.

Q. Once again, that's from that same report dated back in 1985, and it's statements related about this person named Leroy Hendricks?

A. She is – in this report, psychological report, she is talking about – is reporting about the assessment she made of Mr. Hendricks from a conversation with Mr. Hendricks.

Q. Okay.

A. She said that the inmate acknowledged he had been convicted previously in the State of Washington. Again, the record is reported – in a Report of Clinical Evaluation, the record reports in 1956 a charge of indecent exposure; in '59, a charge of lewd conduct. First felony for indecent liberties was in Washington. In 1963, he received a similar charge. The 20-year sentence was suspended, and he was committed to Western State Hospital, this in Washington.

Q. It is correct that that, once again, is information reported by this person named Leroy Hendricks to a psychologist or psychiatrist?

A. Correct.

Q. Okay.

A. Psychiatric Evaluation where Mr. Hendricks also reported [p. 46] information to a psychologist named Leonel Urdaneta. I'm not sure – U-r-d-a-n-e-t-a, Supervising Psychiatrist at SRDC.

Q. And that's generally the same information, is it not? And, once again, it's based upon –

A. It's based on his reporting to those people that he has sexual fantasies and has acted out sexually on children, yes. Those are the types of things that I took into consideration in this diagnosis, as well as convictions.

Q. So the information or a good deal of the information you used in reaching your diagnosis and opinion was based upon what Leroy Hendricks had told to other health care providers, is it not?

A. Correct.

MR. WEILERT: Your Honor, at this point I would move that Mr. Crask's opinion be stricken based upon a violation of the physician-patient privilege. The information given by Mr. Hendricks to those persons was privileged. He was not waived the privilege and, therefore, it cannot be used in a civil proceeding, which the State so vehemently says this is, unless it is regarding care and treatment for injuries for which the plaintiff is seeking damages, and it's simply all inadmissible. His opinion is based upon it, and his opinion should be stricken.

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JOURNAL ENTRY DENYING MOTION TO DISMISS PETITION AND FINDING PROBABLE CAUSE (8/19/94)

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
PROBATE DEPARTMENT

IN THE MATTER OF THE CARE AND TREATMENT OF Leroy V. Hendricks	)	CASE NO. 94 P 964
Respondent	)	

PURSUANT TO KANSAS STATUTES ANNOTATED 59-29(a)01 et.seq. (1994 SESSION LAWS)
An Act concerning persons who commit sexually violent offenses.

JOURNAL ENTRY

NOW ON THIS 19h [sic] day of August, 1994, this matter comes before the court pursuant to **K.S.A. 1994 Session Laws 59-29(a) 01 et. seq. (The Sexual Predator Act)** upon the petition and motion filed by petitioner alleging respondent to be a sexually violent predator as defined by law and for a finding of probable cause that respondent should be taken into custody, transferred to an appropriate treatment facility and evaluated by a qualified professional. The State of Kansas appears by and through its attorneys, Nola Foulston, District Attorney for the Eighteenth Judicial District and Debra Barnett, Assistant District Attorney. Respondent, Leroy V. Hendrick, appears in person and with his counsel, Thomas J. Weilert for E. Jay Greeno. There are no other appearances.

WHEREUPON, counsel for respondent moves the court for an order of dismissal of the petition, and submits a brief in support thereof. Further, counsel for respondent moves the court, in limine, for certain other orders. The court, being fully and duly advised in the premises finds as follows: Under the Sexual Predator Act, the peition [sic] filed by petitioner is sufficient to allege a cause of action as required by statute. Further, the court finds that respondent has been served and that counsel for respondent has also personally been served with certified copies of all documents on the 17th day of September, 1994 upon their filing with the court. The court further finds that respondent's motions are not premature, however, the court reserves ruling of the issue of constitutionality of the Sexual Predator Act and upon respondent's assertion that the State is estopped from proceeding under the Sexual Predator Act by virute [sic] of prior plea negotiations entered in the criminal case filed against respondent, to wit: 84 CR 1463. The Court does not rule upon petitioner's request that the proceedings be closed to the public and confidential.

WHEREUPON, petitioner presents evidence in support of its petition and motion. Upon motion of petitioner, the Court, after being fully and duly advised in the premises, takes judicial notice of the files of the District Court for the Eighteenth Judicial District, particularly, the action entitled **State of Kansas v. Leroy V. Hendricks, 84CR 1463** respondent herein. The petitioner rests. The respondent does not present evidence.

WHEREUPON, the Court, after having reviewed the official court file and its contents, after hearing the evidence, statements and arguments of counsel, and otherwise being fully and duly advised in the premises finds that probable cause exists to believe that respondent, Leroy V. Hendricks, the person named in the petition, is a sexually violent predator as defined by **K.S.A. 1994 Session Laws 59-29(a) 01 et. seq.** The court further finds that the respondent shall be taken into the custody of the Sheriff of Sedgwick County, and delivered to the custody of the Larned State Security Hospital, Larned, Kansas, an appropriate facility, for an evaluation by a professionally qualified person, to determine if the respondent is a sexually violent predator. A report of such evaluation shall be delivered to the court on or before September 19, 1994.

IT IS THE FURTHER ORDER OF THE COURT that respondent shall have appointed expert or professional persons to perform an examination on his behalf and that Larned State Hospital shall cooperate in making respondent available for this purpose at a location agreed upon by counsel or further ordered by the Court.

IT IS BY THE COURT SO ORDERED.

/s/ Paul W. Clark
PAUL W. CLARK
JUDGE OF THE
DISTRICT COURT

APPROVED BY:

/s/ Nola Foulston
NOLA FOULSTON,
#09175
District Attorney

/s/ Debra Barnett
DEBRA BARNETT,
#12729
Assistant District
Attorney

/s/ Thomas J. Weilert
THOMAS J. WEILERT
#08626
Attorney for
Respondent

MEMORANDUM AND ORDER CONDITIONALLY RULING THAT MATTER IS CIVIL PROCEEDING, NOT CRIMINAL (9/13/94)

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
PROBATE DEPARTMENT

IN THE MATTER OF THE CARE AND TREATMENT OF Richard L. Beam, Respondent;	)	Case No. 94 P 963
IN THE MATTER OF THE CARE AND TREATMENT OF LeRoy V. Hendricks, Respondent;	)	Case No. 94 P 964

PURSUANT TO Kansas Statutes Annotated 59-29(a)01 et. seq. (1994 Session Laws)
An Act concerning persons who commit sexually violent offenses.

ORDER and MEMORANDUM OPINION

This court has before it at the present time the very limited issue – Is K.S.A. 59-29(a)01 et seq. enacted in the 1994 legislative session, a criminal or civil proceeding?

The state contends that it is a civil commitment proceeding and the Respondents contend it is a criminal proceeding. The resolution of this issue will control over discovery procedures, including, but not limited to, requests for admissions, interrogatories, production and disclosure of relevant documents and witnesses, including expert witnesses. In addition, the matter of expert fees and costs of examination of the person as well as

attorney fees for counsel representing these persons, need to be addressed as to which governmental agency will be obligated to pay for these – the county if civil or the state if criminal?

Counsel have presented their respective briefs. After reviewing the same and other consideration of this issue, the court finds that the Act is a civil commitment proceeding.

In determining whether a statute is categorized as civil or criminal in nature, the court looks to the language of the statute and legislative history analyzing the purpose and effect of the statutory scheme. *Allen v. Illinois*, 478 U.S. 364, 368, 106 S.Ct. 2988, 291, 92 L.Ed. 2d 296 (1986). In *United States v. Ward*, 448 U.S. 242, 248, 100 S.Ct. 2636, 2641, 65 L.Ed. 2d 742 (1980), the Court adopted a two-part analysis:

> First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. (248-49)

As the court did in *In re Young*, 857 P.2d 989 (Wash. 1993), it looked first to the language of the statute and the legislative history, then turn to an analysis of the purpose and effect of the statutory scheme. Washington enacted the Community Protection Act of 1990. Part X of the Act (REW 71.09) is entitled "Civil Commitment." Those defendants who are determined to be "sexually violent

predators" can be involuntarily committed after they have served their sentences. It is suffice to state that this statute is comparable to K.S.A. 59-29(a)01.

1. Language of the Statute and Legislative History.

The title refers to "An act concerning persons who commit sexually violent offenses; relating to such person's civil commitment; evaluation, care and treatment; allegation of sexual motivation in criminal cases." Section 1 sets out legislative intent and history and concludes with the statement ". . . . therefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature."

The procedural provisions set out in Section 4, 5 and 6 are similar to a civil involuntary commitment under K.S.A. 59-2908 et seq. although persons under this Act have the right to a 12-person jury rather than six and a finding beyond a reasonable doubt rather than clear and convincing proof.

Section 7 provides that upon a determination by court or jury, that the person is a sexually violent predator, that person shall be committed to the custody of the secretary of social and rehabilitation services for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. It further provides that such control, care and treatment shall be provided at a facility operated by the department of social and rehabilitation services and shall be kept in a secure facility and such persons shall be segregated at all times from

any other patient under the department's services. Commencing in June 1, 1995, these persons committed under this act shall be kept in a facility or building separate from any other patient under the supervision of the secretary.

Section 8 provides for annual examination of the person's mental condition with a right to assistance of qualified professional persons, a right to petition the court for discharge, a right to counsel, a right to be released if there is a determination by the secretary that the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released (Section 10).

2. Purpose and Effect of the Act

If the Act is punitive either in purpose or effect then the state's categorization that the statute is civil in nature would not be controlling. Here the focus is on treatment not punishment nor on criminal culpability of past actions. The Department of Corrections plays no role in the care and custody of the person in the statutory scheme. The court has been informed that at the present time, the two persons involved in these proceedings are confined at the Security Behavior Ward of Larned State Hospital – the Jung Building, under security of a guard. Their confinement is based upon a finding by the Honorable Paul Clark, district judge that there is probable cause to believe that these persons are sexual violent predators and that they be taken into custody and transferred to an appropriate facility for the evaluation. (Section 4) The court assumes that this place of detention is temporary, as

Section 7(b) provides for a more permanent facility. This fact, standing alone, will not constitute such punishment as to negate the civil nature of this act.

Allen, supra, held that an Illinois statute providing for civil commitment of sexually dangerous persons was properly categorized as civil, not criminal, particularly where the state had a statutory obligation to provide care and treatment designed to effect recovery for those committed and allowed for release when no longer dangerous, as in the instant Act.

The Act is focused on treating these persons for a current mental abnormality and not for any punitive measures for past actions. Incapacitation has often been recognized as a legitimate civil goal. *Addington v. Texas,* 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed. 2d 323 (1979).

Respondents argue that an examination of the overall tenor of the act reveals its criminal nature because of the references to specific provisions of the Criminal Code which they claim outweigh the number of references to the Probate Code. In *State v. Boos,* 232 Kan. 864, 659 P.2d 224 (1983), the court was faced with a similar argument. The court, holding that K.S.A. 8-286 was civil in nature and not criminal, acknowledged the various references to the criminal code provisions but held that "the quasi-criminal language used is not the sole criteria for determining whether the statute is criminal or civil". Like the instant case, no criminal sanctions are imposed as are required in a criminal proceeding.

It is the opinion of the court that K.S.A. 59-29(a)01 et. seq. is civil, not criminal, in nature. Both the language and history of the Act and its purposes and effect support

this conclusion. The Respondents have failed to establish that the statutory scheme of the Act is so punitive in purpose or effect as to negate legislative intent that this proceeding is civil in nature. Allen, supra, at 369. Based upon this holding, the court finds that matters of discovery including but not limited to requests for admissions, interrogatories, production and disclosure of documents and witnesses, including expert witnesses, shall be controlled by Chapter 60 of the Code of Civil Procedure. On the matter of necessary and reasonable expenses, costs and attorney fees, as set out in the Act, Sedgwick County will be obligated to provide funds as per court orders to be issued herein.

The state has filed a Motion For An Order Compelling Discovery And Other Relief in both cases. The motions allege that the Respondents were advised by their counsel not to participate in the evaluation process and Respondents have not so participated. Sanctions against Respondents have been requested.

Section 5 of the Act provides that upon a finding of probable cause, that person shall be taken into custody and transferred to an appropriate facility for an evaluation. The evaluation shall be conducted by a professionally qualified person. Judge Clark found probable cause and ordered the Respondents to be taken to the Larned Security Hospital and submit to an evaluation to determine whether the Respondents are sexually violent predators as defined by law.

Within 45 days after the filing of the petition the Respondents shall be provided a trial to determine whether that person is a sexually violent person. The

burden of proving that a person is a sexually violent predator is upon the state.

The respondents have the right to be examined by experts of their choosing and this evaluation would be relevant if Respondents offer this testimony in the trial.

Respondents' refusal to participate may jeopardize the state's position on the burden placed upon it.

This court has found that this proceeding under K.S.A. 59-29(a)01 et seq. is civil in nature. There has been no specific finding by this court that the Fifth Amendment privilege against self-incrimination is applicable in a civil proceeding such as this; however, the prevailing view expressed in *In re Young*, supra, is that persons subject to involuntary civil commitment as sexually violent predators have no constitutional right to remain silent unless it is conclusively shown that sanctions imposed upon that person are tantamount to a criminal proceeding.

This court has found that the Department of Corrections has no involvement in the confinement of Respondents at the Larned Security Hospital. The evaluation is to be done by SRS staff. The only reason that Larned received the Respondents is because SRS at the present time has no "appropriate facility" to detain Respondents and do the evaluation required by law. John House, counsel for SRS has informed the court that if an order is entered to return Respondents back to Larned for evaluation completion that Respondents will be placed in the same facility under SRS control.

Unless Respondents are prepared to conclusively prove to this court that they are subject to punitive measures other than an involuntary confinement at the Larned institution, this court will order that the Respondents be transported to the Larned facility for further evaluation. They are presently confined in the Sedgwick County jail. Further, the Respondents are ordered to cooperate with the SRS staff and participate as the staff deem appropriate in the evaluation as required in this Act.

Unless, Respondents carry this burden, Respondents have five (5) days to comply with this order. Failure to do so will subject them to the various sanctions requested by the state, including a tolling of the 45 day requirement for a trial.

Respondents will remain in the Sedgwick County Jail pending an order from this court to be made at the hearing on September 16, 1994.

This Order is effective this 13th day of September, 1994. Faxes of this Order are being sent to:

The Honorable Michael Corrigan - (316-383-7560)
Nola Foulston, District Attorney - (316-383-7266)
Laura Shaneyfelt, Defense Counsel - (316-269-0474)
Thomas J. Weilert, Defense Counsel - (316-~~263-3805~~) 263-0251
John House, SRS Counsel - (913-296-4960)

/s/ Michael A. Barbara
Michael A. Barbara
Assigned District Judge

LETTER FROM DISTRICT COURT TO COUNSEL CLARIFYING THAT ORDER WAS CONDITIONAL (9/15/94)

September 15, 1994

FAX

TO: Nola Foulston, District Attorney – 316 383-7266
Laura Shaneyfelt, Defense Counsel – 316 269-0474
Thomas J. Weilert, Defense Counsel – 316 263-0251

Re: Beam – 94P963
Hendricks – 94P964

The court's Order and Memorandum Opinion was conditional as to the matter of privilege against self-incrimination. Respondents have the right and opportunity to present evidence and/or legal arguments on this issue. This court cannot "shut its eyes" on what the prevailing view appears to be. Counsel will have full opportunity to be heard on this issue.

/s/ Michael A. Barbara
Michael A. Barbara
Assigned District Judge

TRANSCRIPT OF PROCEEDINGS OF SEPTEMBER 16, 1994

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[p. 20] necessary to make some record about the types of things that will be happening to them under this Act and with that in mind, I request the Court to make a record now, present evidence.

THE COURT: Any objection?

MR. WEILERT: No, Your Honor.

THE COURT: All right.

MR. PUNTCH: Terry, would you please come forward?

TERRY E. DAVIS,

called as a witness on behalf of the Petitioner, The State of Kansas, having been first duly sworn, testified as follows:

MR. PUNTCH: Before we proceed, I should also let the Court know on the record that prior to the time the witnesses have been called, they have been made available to counsel for the respondents and they have had an opportunity and in fact did speak with the witnesses before testimony today without us being present.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. PUNTCH:

Q. For the record, would you tell us your name please?

A. Terry Davis.

[p. 21] Q. And what do you do for a living?

A. I work for Mental Health and Retardation Services which is a division of SRS.

Q. How long have you worked for them?

A. In Topeka, in central office, I've worked for six years.

Q. And before being in Topeka central offices?

A. I worked for MHRS in state mental hospital.

Q. What – and here in Kansas?

A. Yes.

Q. What mental hospital?

A. Osawatomie State Hospital.

Q. How long did you work there?

A. Since 1979.

Q. What did you do at Osawatomie State?

A. I was a staff nurse; I also was a supervisor.

Q. What's your current job title?

A. Director of Quality Assurance.

Q. And can you tell us what that means; what do you do?

A. Well, I have a multiplicity of jobs. I do investigations of private psychiatric hospitals, I'll recommend to the Secretary licensing psych hospitals, I oversee the NFMH Program.

Q. Could you tell us what that means?

A. NFMHs are nursing facilities for mental health.

[p. 22] Q. All right.

A. There are 14, I think, currently. We downsized the entire program and what they are is nursing home – nursing facilities that basically specialize in the care and treatment of persons with mental illness.

Q. I believe you said just a moment ago that you make recommendations to the regulatory board to license private mental facilities?

A. The Secretary's the one who issues the licenses for private psychiatric hospitals and I do the investigations and surveys and so forth for the State, and basically make a recommendation to the Commissioner and the Secretary.

Q. In general, what do the investigations that you make of private hospitals consist of?

A. Well, basically whether they're complying with the quality of treatment issues and if they have the appropriate facilities and staff to treat the – the patient. I also take a look at whether or not they're complying with joint commission on hospital accredidation regulations and HIKFA certification requirements.

Q. And your – I presume you're required to be familiar with all of those qualification requisites to do that job?

[p. 23] A. Yes. I also do a lot of other things with the agency. I mean, I consult with the psychiatric hospitals and – and get involved in the certain specific program issues that the Commissioner asks me.

Q. Before we come back to specific programs, I wonder if you could just tell us briefly your educational background, training, experience that you've had for the work you are doing now?

A. I have a BS in Nursing, I have a Master's Degree in Health Care Administration. Okay. In terms of experience, I have considerable experience with the military on active duty. When I got out of the military in '79, I went to work for MHRS in the state psychiatric hospital. I've done consulting work for the area in terms of the program development for stress management, psychiatric augmentation, and I currently am the Executive Officer for the 1908th CSC Detachment, which is a mental health augmentation unit in Topeka. And –

Q. Does your work for the Secretary require you to visit the various mental health facilities here in the State of Kansas?

A. Yes.

Q. And as a result of your work there, are you familiar [p. 24] with them and their surroundings?

A. Yes.

Q. Mr. Davis, were you asked by the Secretary to perform a function with initiation of a treatment program for sexually violent predators?

A. I was asked by the Commissioner, yes.

Q. I beg your pardon, the Commissioner? What were you asked specifically to do?

A. Organize programmatically and instruct really the – the program, the sexual predator program for SRS. Under Senate Bill 525 SRS, of course is mandated to set up a program to treat, you know, sexually violent predators.

Q. Are you involved in the process of selecting treatment personnel for that part of the program?

A. Yes.

Q. Are you also responsible for the cite where the program will be?

A. The cite for where the program will be was basically agreed upon before I was asked by the Commissioner to get involved in the program–

Q. Where is the location of the sexually violent predator program today, where will it be?

A. It will be on unit F-4 of the Larned Correctional Mental Health Facility.

[p. 25] Q. Have you been to unit F-4?

A. Yes, sir.

Q. Can you tell us a little bit about what unit F-4 is like?

A. Well, it's basically a typical ward environment. I mean, it's a hallway with rooms on each side, with a day hall in the front, that's the configuration of it.

Q. How many patients can be treated there?

A. 30.

THE COURT: Mr. Puntch, for clarification, is he testifying concerning what will be when they complete the program?

MR. PUNTCH: I'm getting to that. I'm starting with today and working forward, Your Honor.

THE COURT: Okay. Thank you.

Q. (By Mr. Puntch) While the patients in the sexually violent predator program are in treatment there at the facility you have today, will they be afforded the rights as the other mental patients are, as the laws under the State of Kansas?

A. You mean when we start the sexual predator program at Larned Correctional Mental Health? Today we have no one in the program.

Q. I understand. Once the program begins and you –

[p. 26] A. All right.

Q. – do have patient in programs. Does that, help you understand my question?

A. Yeah, yes, right.

Q. Okay. As I'm sure you are aware, under Article 59 of the Kansas statutes, mental –

A. Right.

Q. – health patients have certain rights?

A. Correct.

Q. Okay. And you are familiar with those?

A. Oh, yes.

Q. Will the patient in the sexually violent predator program be accorded those same rights?

A. Yes.

MR. WEILERT: Well, Your Honor, I object. First of all, the statute itself is considerably different from the rest of Chapter 59 as far as the evaluation and release procedures, the furlow procedures. If Mr. Davis is testifying that those are the same, then he is obviously incorrect and would ask the Court to take notice of the statute rather than what he is saying.

MR. PUNTCH: Your Honor, I'm not sure, what's the legal basis of the objection? I'm not sure how to respond.

[p. 27] THE COURT: What's the legal basis for your objection?

MR. WEILERT: Your Honor, it's the form of the question; it calls for a legal conclusion that Mr. Davis isn't capable of making.

THE COURT: I assume that you're – your question assumes a basis that the rights of these patients are the same that other patients have and – and according to the objection, apparently they're not set out similarly, programs, we need to clear it up.

MR. PUNTCH: All right.

THE COURT: With his background, whether he knows what the rights are rather than just a statement he understands – he knows the rights, but how about specifically what are the rights.

MR. PUNTCH: Very well, Your Honor. We'll proceed in that fashion.

Q. (By Mr. Puntch) The rights which are generally accorded mental health patients under Chapter 59, are you familiar with the specific rights? For example –

A. Well –

Q. – as I understand it, if patients in treatment have a right to wear their own clothes?

[p. 28] A. Correct.

Q. And not wear a uniform?

A. Correct.

Q. It's those kind of things I'm talking about.

A. Correct.

Q. And with the regard to the patient in sexually violent predators program, are they going to be able to wear their own clothes?

A. Yes.

Q. All right. I think – do you have a clear recollection at this point of what the rights under that section are?

A. That's why I carried my briefcase.

Q. Okay.

A. So I can always refer to it.

Q. You can refer to?

A. Okay.

Q. Have you been handed what looks like a blue notebook?

A. Yeah.

Q. With some things in it?

A. That's what I keep in my briefcase so that I can refer to it, because my memory isn't the best usually.

Q. Are you going to refer to a specific statute now to [p. 29] review those things I've asked you about?

A. This is mental health law.

Q. Okay.

A. 59-280 – no, let's see, Article 29, Care and Treatment of Persons. Care and Treatment for Mentally Ill Persons, 59-290, 1 through whatever.

Q. And in that are specifically listed some rights accorded patients?

A. Right.

Q. Who are simply committed?

A. 59-2929.

Q. All right. And can you tell me what those are?

A. Is to wear your own clothing, keep and use personal – patient's own personal possessions including

toilet articles, keep and be allowed to spend the patient's own money.

Q. All right. I want you to read through those and if you come to any of those that will be different with the sexually violent predators program, why don't you tell us?

A. Okay. The one issue, allowed to keep and have their own money, they will have access there – they will have money and they will be able to order through the canteen fund.

Q. All right. Will they be able to order items from [p. 30] outside the grounds?

A. Yes.

Q. For example, could they get a tie from a Lands End catalog if they were there?

A. Sure.

Q. All right. Please continue.

A. Okay. To communicate by telephone. Both make and receive confidential calls, by letter – both by mail and receive unopened correspondence except that if the head of the treatment facility would deny the patient's rights to mailing or receive unopened correspondence under the provisions of Subsection B, such correspondence shall be opened and examined in the presence of the patient, yes. Conjugal visits in the facilities are available. We –

Q. Are there any facilities that are available?

A. There are no facilities available in any of the institutions or Larned Correctional Mental Health Facility.

Q. Okay. Any mental health institution run by the State of Kansas?

A. Correct.

Q. No facilities are available for conjugal visits?

A. Correct.

Q. Okay. Continue.

[p. 31] A. To receive visitors each day, yes. To refuse involuntary labor and to be paid for any work performed other than that of housekeeping of the patient's own bedroom and bath, subject to provisions of K.S.A. 1992, that's so on – yeah.

Q. Okay.

A. Not to be subject to such procedures as psychosurgery, electroshock therapy, experimental medication, aversion therapy, or hazardous treatments and procedures without the written consent of the patient and the written consent of a patient guardian or other person in a local parentis, if such person has a living parent or guardian or other local parentis, yes. To have explained, the nature of all medicines prescribed, the reason for the prescriptions and the most common side effects and if requested, the nature of any other treatment ordered, yes. To communicate by letter with the Secretary of Social and Rehabilitations services, the head of the treatment facility and the court, physicians, psychologists, minister of religion, including Christian Science practitioner or attorney,

and such communication shall be forwarded at once to the addressee without examination. Communication from such persons shall [p. 32] be delivered to the patient without examination, yes. To be visited by the patient's physicians, psychologist, minister of religion including Christian Science practitioner at any time, yes. To be informed orally or in writing of the patient's rights under the section upon admission to the treatment facility, yes.

Q. Very well. Now, while they are in the sexually violent predator program in treatment, will they have their own room?

A. Yes.

Q. While they're there there in treatment will they receive a per diem or a payment?

A. Per diem or payment?

Q. Do they receive any kind of wage or anything for being there?

A. No.

Q. No; okay. Now, the place where they're going to be housed initially if the treatment program begins, will that be locked?

A. Yes.

Q. Will they be kept separate from other patients there at the same facility?

A. Their – currently there are no patients at the Larned Correctional Mental Health Facility.

[p. 33] Q. All right.

A. There – it's a DOC facility.

Q. Okay. The initial facility that you're going to have for the sexually violent predator treatment program, you've described to us, are there plans for moving to a different location or remain at the same cite?

A. There are preliminary – preliminary plans in conjunction with DOC to build a different configuration within the Larned Correctional Mental Health Facility for the sexual predator treatment program.

Q. The location where the people in the sexually violent predator program is will belong, essentially, to them alone; is that what you are telling me?

A. Would you repeat that?

Q. The building where they are going to be, that will be just for them?

A. Yes, the unit that they're going to be on, the ward, yes.

Q. Okay. Can you tell us how the ward will be staffed?

A. They will be staffed by SRS employees.

Q. I see. And will they be in charge of the day-to-day running of the facility?

[p. 34] A. The ward, yes.

Q. The ward, all right.

MR. WEILERT: Excuse me, Your Honor. I haven't been listening close enough perhaps. Are we talking about what the facility is now, what Mr.

Hendricks and Mr. Beam would be committed to, you know, in two weeks or whenever that would happen or this new facility that is proposed?

MR. PUNTCH: I'm still talking about the facility now, where they've been housed.

MR. WEILERT: Thank you.

THE COURT: Are we all agreed?

THE WITNESS: Right.

Q. (By Mr. Puntch) The ward where they will be committed to.

A. There is one issue, initially there's a transition phase.

Q. Okay.

A. The unit F-4 currently is occupied by DOC folks, okay.

Q. Department of Correction folks?

A. Right, the mental –

THE COURT: Excuse me. You say folks, you mean staff or –

THE WITNESS: Inmates.

[p. 35] THE COURT: Inmates, okay?

THE WINTESS: Inmates.

Q. (By Mr. Puntch) What's – what will happen to them?

A. Well, they will be transitioned out but not immediately, so –

Q. All right.

A. I have discussed with the warden, you know, how we will keep the, anyone who's committed in the sexual predator program separated from the inmates while they transition those people out.

Q. Have you all arrived at a plan to do that?

A. Yes.

Q. How long is this transition period expected to last?

A. I really can't answer that question; it shouldn't be very long, but the Department of Corrections facilities don't have any room; in SRS facilities we would normally use, they have no room either. I spoke with the warden and he feels that a lot of the current inmates in that unit can be transitioned back into the general population in the prison system, so that –

THE COURT: How many inmates are there?

THE WITNESS: Currently on that unit? I – this is a guess, I would say 25, 26.

Q. (By Mr. Puntch) What are the plans that you have to [p. 36] keep people committed under the Sexually Violent Predators Act separate from the other people on the ward during the transition period?

A. Okay. We've discussed building a petition on the hall – on the hall, a gate basically and then my staff would be in the attendance strictly in attendance with anyone committed to the sexual predator program; they will not be DOC staff. During any time when they've

been on the day hall they will be escorted, as they currently are, by SRS staff.

Q. Have you made provision for the treatment component, not the physical?

A. Yes.

Q. That facility now, the treatment components of the program?

A. Yes.

Q. Can you tell us what you've done with regard to that?

A. The agency published an RFP, a Request For Proposal to provide clinical treatment for the sexual predator program. We've subsequently received two proposals. We've gone through the point of having negotiations and then we've even gotten the best and final offer from two agencies which have presented [p. 37] us with proposals where we currently – we're in the process of, we aren't, but Department of Administration, Division of Purchases, is the one who writes the contract, so at this point we're in the – we're in the process of issuing a contract.

MR. PUNTCH: Excuse me.

(At this time Petitioner's Exhibit 1 was marked for identification.)

Q. (By Mr. Puntch) I've got six deep of pages that are stapled together and on the back is written Petitioner's Exhibit Number 1. Would you just glance briefly through that document and see if you recognize what that is?

A. This is – that is the RFP that the agency published, the Request For Proposal.

Q. And is that the RFP as you call it, that two different mental health care providers have submitted proposals on and is that the same RFP that each of those providers have qualified under?

A. Yes.

Q. Before your testimony this afternoon, did you have a chance to meet with the counsel for the respondents [p. 38] and share with them and give them a copy of Petitioner's Exhibit Number 1?

A. Yes.

MR. PUNTCH: Your Honor, I move to admit Petitioner's Exhibit Number 1.

THE COURT: Objection?

MR. WEILERT: Your Honor, we object because basically this just sets out what the proposal was, we don't have any idea what the proposed contractors are doing in response to this proposal and we don't know who the contractors are. We don't know anything about the qualifications of their staff, so this in and of itself is irrelevant, we feel.

THE COURT: Mr. Puntch.

MR. PUNTCH: Well, actually, Your Honor, I think it's relevance is perfectly clear to the Court.

THE COURT: Let me see it.

MR. PUNTCH: One of the questions is the treatment program that is being proposed and which of

the components of it, and Petitioner's Exhibit Number 1 answers a number of those questions.

THE COURT: Both of the proposals in here are the – what the two providers are going to furnish anybody?

[p. 39] THE WITNESS: We have received them, yes, sir.

THE COURT: Are they – is that included in here?

THE WITNESS: No.

Q. (By Mr. Puntch) That's the requirement that each of the – I'm going to call them bidders?

A. Right.

Q. Or proposals required to – to cover are shown in Petitioner's Exhibit Number 1; is that right?

A. That's correct.

Q. If they didn't cover each of the requirements in there, their proposal would not be accepted?

A. Correct.

THE COURT: And both providers or bidders have been given the same information?

THE WITNESS: Yes.

Q. (By Mr. Puntch) Has a proposal been accepted as of today?

A. I can't say whether it's been accepted; I mean both – both proposals met the requirement and now after

we received that and the – my agents review them to make sure that everything that we wanted is in them, they go to the Department of Administration who takes a look at the physical impacts and then [p. 40] they'll finalize the contract. To – to my knowledge, that has not happened yet. It should happen, it could have happened yesterday, I wasn't in Topeka yesterday, so I couldn't tell you.

Q. Is it expected to happen within the very near future, if not earlier?

A. Oh, yes, yes.

MR. PUNTCH: Your Honor, I would request that Exhibit 1 be admitted.

THE COURT: Is it possible contractually that the provider could modify this contract or –

THE WITNESS: No.

THE COURT: Either they accept this or don't get the job or what's the situation?

THE WITNESS: No.

THE COURT: No what?

THE WITNESS: They can't. They can't modify that, no. I have looked at the best and final offer and the program and they – they meet those, both of the bidders meet the qualifications.

THE COURT: I'll overrule the objection, I'll admit the exhibit.

Q. (By Mr. Puntch) When the proposal is tendered to one of the two bidders, a contract is finalized. What is

the time frame when their mental health [p. 41] parishioners will begin the treatment program there?

A. Approximately –

Q. Tomorrow?

A. Approximately 60 days.

Q. In the intervening period –

THE COURT: Excuse me, 60 days from when?

Q. (By Mr. Puntch) From when?

A. The contract.

Q. The contract day?

A. The signing of the contract.

Q. When, in the intervening period of time between today, the signing of the contract and the time that the contractual mental health providers are there – what will be going on in the treatment program with people who are in the program?

A. Well –

Q. Will anyone be provided treatment?

A. If someone is committed to the treatment program, I made arrangements with the superintendent to provide professional staff at Larned to eliminate the preliminary phases of the program.

Q. When the program begins and there are patients in the treatment program, who will be responsible for doing everything within the ward, providing treatment, doing the usual functions, keeping the [p. 42] ward running, what agency?

A. SRS. Yeah. I will be. Until I can hire a program director, I'll be doing it.

Q. All right.

A. That was – let me interject one thing in that RFP that you've submitted. That was one change in the negotiations that we made. We will be providing the program director and not the – not the people providing the clinical services, that I will provide a clinical director, for the time being, I'm the program director.

Q. Very well. The program director will be someone from SRS?

A. Yes.

Q. All right.

Q. Who will be responsible for security on the ward itself?

A. SRS employees.

MR. GREENO: Excuse me, could we see the exhibit please?

THE COURT: Yes, sure.

MR. GREENO: You can go ahead.

Q. (By Mr. Puntch) Who will be responsible for security on the perimeter of the outside of the facility?

[p. 43] A. The Department of Corrections.

Q. And within the security perimeter of DOC are there other programs that will be going on besides this one, other buildings there or other facilities?

A. Yes.

Q. Can you tell us what those are?

A. Well, the Larned Correctional Mental Health Facility is a facility that was established by Department of Corrections to treat persons with mental illness that were in the prison system and those programs will be going on.

Q. Are there other, I'm going to call them security wards, also within that perimeter?

A. Yes, there – yeah. DOC has other wards, yes.

Q. Other than providing, what I'm going to call perimeter security or security, is there walls around this facility? Maybe I should have asked that?

A. There's a fence, yes.

Q. Okay. Providing security at the fence, other than doing that, will the Department of Corrections be responsible for any of the program?

A. No.

Q. Mr. Davis, if – if one of the patients in the sexually violent predator treatment program does [p. 44] work, decides to work, will they be paid for the work?

A. Yes.

Q. Do you know at what rate?

A. That hasn't been established at this point; we have no funds for that so that won't happen. I mean, they won't be allowed to work, I mean unless they want to work on a voluntary basis on the units, some small tasks,

but pretty much, in terms of going into another area and working like an inmate would, no, we don't have funds set up for that at this point.

Q. That hasn't been done as of this time?

A. No.

Q. Now, have you been to the treatment program facility in the State of Washington?

A. Yes.

Q. And are you – are you aware that the Kansas statute is in most ways the same as Washington statute?

A. Yes.

Q. Can you describe how the facility in Larned is the same or is different, either way, as the facility in Washington state, that you've seen?

MR. WEILERT: Object, Your Honor, it has no relevancy to the Court's decision here today.

THE COURT: I'd have to hear more [p. 45] foundation, see what relevancy it has.

MR. PUNTCH: Very well, Your Honor.

Q. (By Mr. Puntch) You have seen that facility there in Washington; is that correct?

A. Yes, yes.

Q. And you have been there while treatment has been provided?

A. Yes.

Q. You have seen, – was that before – well, tell me when you saw that, maybe that's a better question. When did you go up there?

A. May, I think. I don't know, several of us flew back there and –

Q. What was the purpose of going there?

A. To get an orientation of the way they do things, as far as – there is so much involved in the sexual predator law, all the way from this phase to the treatment phase to the clinical phase to the security, all those things we needed – we needed an understanding of how their – they're accomplishing what their law says.

Q. The things that you saw and learned there, did they form part of the basis of the kind of facility that Kansas is going to have?

A. Yes.

[p. 46] Q. Can you tell me what things that you saw there and discussed with staff there, helped to forge part of the basis of the kind of facility Kansas is going to have?

MR. WEILERT: Your Honor, once again, I object at this point. It certainly appears to be irrelevant and of no probative value.

MR. PUNTCH: Well, on the contrary, Your Honor, the facilities in the State of Washington's part and parcel to the litigation in the case of In re Young, where identical issues to those raised by counsel for respondents have been raised in this hearing. The type of facility, how the facility came to be is one of the issues that the Court needs to hear in order to resolve the questions

which they've raised, particularly with regard to the issue of privilege, how and where we're getting to where we are and the basis that is clearly relevant.

THE COURT: Did I – do I recall somewhere in looking at Young that Washington statute was enacted about 1980, anybody know for sure?

THE WITNESS: I think it was 1990.

MR. WEILET: '90.

MR. PUNTCH: I think it was '90, Your Honor.

THE COURT: So they have had four years to [p. 47] work on their statute then?

MR. PUNTCH: Yes, Your Honor.

THE COURT: And you were there when, sir?

THE WITNESS: In May.

THE COURT: Of this year?

THE WITNESS: This year.

THE COURT: I'll allow – I'll allow the question. I'll allow the background that he can give us to – I'm assuming what he's going to testify is what he saw up there may apply here.

MR. PUNTCH: Yes, Your Honor.

THE COURT: At a treatment program.

MR. PUNTCH: That's the purpose of my question.

THE COURT: I'll allow it along those lines.

Q. (By Mr. Puntch) Do you want me to repeat the question or –

A. Yeah, repeat the question now.

Q. With regard to the visit that you made to the facility in the State of Washington for treating sexually violent predators, I'd like to know the things that you saw, heard and did there that helped you form a basis for the facility that we're going to have here in Kansas and the treatment program we're going to have.

[p. 48] A. We interviewed all levels of staff, including the treatment staff, the direct care staff and interviewed even some residents in the program. We made general observations of – of the layout of the facility and we did careful examinations of their procedures and policies. Talked a lot on the evaluation process with the – the director of psychology who does most of the evaluation for the program.

Q. Where is the – I'm sorry, where is the treatment facility in Washington state located?

A. In Monroe State Penitentiary.

Q. Is that a state penitentiary?

A. Yes, it is.

Q. Is it on the grounds of the state penitentiary?

A. Yes.

Q. If you know, Doctor, who – who provides the treatment components of the program there in the State of Washington?

A. Who provides the treatment program?

Q. MH?

A. The treatment program.

Q. What agency, I guess, is what I'm asking.

A. Subpart of SRS provides that.

Q. The treatment program which is used in the State of [p. 49] Washington for the sexually violent predators, have you adopted any of that treatment program for these here in the State of Kansas?

A. Yes. The providers who submitted the bids to us also contacted Washington and reviewed the program because they wanted to see how they were going to do it so I can say that both the potential clinical providers are also modeling what they treat – their treatments after Washington.

MR. PUNTCH: Your Honor, I don't believe I have any further questions. No further questions.

THE COURT: Mr. Weilert, cross?

MR. WEILERT: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. WEILERT:

Q. Mr. Davis, Mr. Puntch asked you whether the persons who would be committed under the Sexual Violent Predator Act would have the same rights as those committed under other statutes for the care and treatment of mentally ill; do you recall that question?

A. Yes, these –

Q. Okay. If you go a little bit farther through the statute dealing with those type – or with the care and treatment of mentally ill persons –

[p. 50] A. Mm-hmm.

Q. – there are other provisions, are there not, regarding furloughs for people in those treatment facilities, aren't there?

A. I just – I just addressed the issues of the patient rights, I –

Q. Well, don't you think a right to a furloughs is a patient right?

A. Well, not according to this.

MR. PUNTCH: Object.

THE COURT: Just a minute.

MR. PUNTCH: Object. It's argumentative, Your Honor.

THE COURT: Overruled. You may answer, sir.

A. The right to a furlough? It's not addressed in this – in the – in the patient's rights, 1 through 10 that I enumerated under that.

Q. (By Mr. Weilert) Okay. But you are aware that the act for the care and treatment of the mentally ill persons does provide for furloughs, are you not?

A. It's possible to get a furlough from the hospital.

Q. Okay. And it's also provide – that Act also provides for release procedures which can be accomplished

simply by the head of the facility there the person is being held to release that [p. 51] person; isn't that correct?

MR. PUNTCH: Excuse me, again before you answer, I wish to object on the grounds of relevance as furlough release procedures are all specifically dealt with in the statute covering sexually violent predators.

THE COURT: Well, I think Mr. Weilert's point and maybe I misunderstood it too, that on direct exam, you likened the rights under this statute to other patient rights and I thought he said that they were the same and then he started reading off those similar ones; am I misunderstanding something here?

MR. WEILERT: That's my understanding, Your Honor.

MR. PUNTCH: Well, Your Honor, I think that what Mr. Weilert's talking about is in a different statute than the one Mr. Davis was asked to refer to.

MR. WEILERT: I believe he referred to 59 Section 2901 et seq.

THE COURT: Well, he–

THE WITNESS: 2929.

THE COURT: 2929 I thought, he pinpointed.

MR. WEILERT: Okay. Then those specific [p. 52] procedures I've talked about are not in 20 – 2929.

THE COURT: 2929 – 59 dash.

MR. WEILERT: But they are in the Act for the care and treatment of mentally ill persons which the

general answer at the beginning was that, yes, they have the same rights.

THE COURT: Well, perhaps maybe a little confusing, Mr. Puntch's questions concerning rights were directed to this statutory provision and what you're contending, using some other provisions, that they have different rights and I don't know whether that's relevant, if they have other rights in other – for other provisions unless you're showing that what they don't have under this Act, what the patients don't have under this Act may affect the – the status of whether this is criminal or–

MR. WEILERT: Quasi-criminal, yes, sir.

THE COURT: Okay, well if he knows, I'll let him answer. He may not have the personal knowledge.

Q. (By Mr. Weilert) Are you aware–

THE COURT: Wait for another question.

THE WITNESS: Yeah.

Q. (By Mr. Weilert) Are you aware, sir, that under other provisions other than 59-2929 of the Act of the care and treatment for mentally ill persons–

[p. 53] A. Sure, yes.

Q. – that a director of a mental health facility can authorize the release of a patient without any hearing in court or any court intervention?

A. If you're asking me specific knowledge I couldn't quote you, I mean I'm basically aware that those things exist, yes.

Q. That under the Sexually Violent Predator Act that cannot potentially happen?

A. No, it can't.

Q. Your understanding of Senate Bill 525 requires a – basically a jury trial?

A. Correct.

Q. Okay. You talked about, and this is specifically under the 59-2929, about certain rights, said that persons committed under the – the general civil commitment statute are allowed to wear their own clothes?

A. Yes.

Q. Are you familiar at all, sir, with any of the Department of Corrections regulations for persons in a mental health facility?

A. Yes.

Q. Run by the – run by the Department of Corrections?

A. Yes.

[p. 54] Q. Are those persons allowed to wear their own clothes?

A. No.

Q. Okay. Are they allowed to have personal possessions?

A. Some, yes, as – as they meet the DOC criteria, they have a specific regulation deliniating what people can have.

Q. Is it correct that SRS also has regulations delineating what people can have?

A. Not specifically.

Q. So, a person committed under the sexual predator act could bring anything, any personal property he wanted into the facility?

A. With certain limitations.

Q. So you do have limitations on it?

A. There would be limitations.

Q. Possessions?

A. Yes.

Q. Um–

A. Well–

Q. How about to the person in DOC custody, can they have personal funds to order through a canteen or some sort of facility for personal items, cigarettes, that type of thing?

A. Yes.

[p. 55] Q. Can persons in Department of Corrections custody communicate by telephone with lawyers and family members?

A. Yes, as far as I know, they can.

Q. Are they allowed to have unopened correspondence or if their correspondence is going to be opened, have to be physically present when it's done?

A. Can I preface all this by saying I'm not intimately familiar with all of the DOC regulations?

MR. PUNTCH: Your Honor, I'm going to object. Clearly the witness doesn't have the basis of knowledge to answer the question.

THE WITNESS: I think that's the case but I don't know.

THE COURT: I think, yes, we need someone with more direct knowledge. Then the earlier objection concerning the rights of the patients where Mr. Puntch made the objection, I'll retract it when I overruled it. I think we need to have someone more knowledgable concerning rights of clothing, personal property, DOC, and I don't think this witness is competent or qualified, to give his own testimony, to give those answers.

MR. WEILERT: That's fine, Your Honor, that is why I asked if he was familiar with them, but [p. 56] apparently he is not.

Q. (By Mr. Weilert) In the event that someone was to be committed under the sexual predator act, say in the next three weeks, where would that person go?

A. Larned Correctal [sic] Mental Health Facility.

Q. To this F-4 unit?

A. Yes.

Q. Okay. Now, F-4, that's, is that like a hallway that–

A. Yes.

Q. – connects with a larger facility?

A. Right.

Q. How many hallways or whatever are there in that building?

A. Five, I think.

Q. Okay. And are they F-l, F-2, F-3, F-4 and F-5?

A. Something like that. I couldn't tell you exactly what the numbers are.

Q. Do those hallways all come into a central area?

A. Yes.

Q. What's located in that central area?

A. Guard – a guard area, I don't know, what they call it, central control area.

Q. A central control area?

A. Yes.

[p. 57] Q. Okay. Who staffs that central control area?

A. Department of Corrections.

Q. And will that also occur, and once again this is all supposing we are three weeks down the road and someone's committed, Department of Corrections will staff that central control area?

A. Yes.

Q. Are there facilities for recreation?

A. Yes.

Q. Where are those located?

A. Throughout the facility, some are on the outside, they have various recreational areas outside, baseball diamond and you know, they also have like weight rooms and libraries and indoor gym – gymnasiums in the facility and those kinds of things.

Q. Are all those facilities available for someone committed under the sexual predator act?

A. Yes.

Q. Are they also available to persons in the custody of the Department of Corrections?

A. Yes.

Q. How about sleeping quarters, are people committed under the sexual predator act, you said they have their own rooms?

[p. 58] A. Yes.

Q. What else is contained in the rooms besides a bed?

A. Toilet facility and a sink.

Q. Okay. And on the other hallways of this building that are in Department of Corrections bailiwick, do they have the same private rooms and facilities?

A. Yes.

Q. What about food, who provides the food for the persons committed unde [sic] the Sexually Violent Predator Act?

A. All the food in that Larned Correctional Mental Health facility is supplied by Larned State Hospital.

Q. Okay. So they have the same food that the Department of Corrections inmates have?

A. Correct.

Q. What about laundry facilities or service?

A. There again, that's provided by Larned State Hospital.

Q. And it's also the same as that for Department of Corrections people?

A. Correct.

Q. Separating out, if you can, and I don't know if you can, actual medical treatment as opposed to the psychological treatment or mental treatment, where [p. 59] is that provided for these people?

A. Medical treatment?

Q. Yes.

A. That's provided by Larned Correctional Mental Health Facility through their contract with PHS.

Q. Okay. And that's the same as the Department of Corrections?

A. Correct.

Q. Isn't it inasfar as, let's say a secured facility, describe that for us, as far as the sexual predators are concerned?

A. It's on the unit there, I don't know what I don't know how to describe it to you. It's a shower.

Q. It's just a–

A. Shower unit.

Q. Kind of a communal shower-type thing?

A. Yes.

Q. Is it the same as the Department of Corrections facility has?

A. Yes.

Q. What specific security would SRS provide on the facility for sexually violent predators?

A. Specific security – basically intervening – I'm going to have to pause and think through how to answer. It's – security that is provided on [p. 60] that unit will be the same as provided in a hospital and that's basically intervening in behavioral-type situations, making sure that the ward rules are complied with, that the treatment programs are complied with. When you – when you ask this in a mental health situation, this is all integrated into the master treatment planning process. You know, so – the – it's just all together and it's part of the treatment planning process.

Q. Would it be correct then that the security aspects of the treatment plan are very similar to those used in the Department of Corrections facility?

A. Probably not, no.

Q. Okay. What would be different, sir?

A. Well, in the mental health facility you develop a master treatment plan to target specific behaviors for

change. Okay, so part of what the staff is doing is making sure that those issues that are identified in the master treatment planning process are complied with and – and the treatment goes forward with that and that intertwines with security issues that you're talking about. I mean if someone, for instance, became violent, I – I suppose the staff would subdue that individual and put them in the leather cuffs and belts, I suppose. [p. 61] We usually avoid that at all costs but if the ultimate intervention, behavioral intervention would be that.

Q. Let me back up and maybe I can ask a little better question. In the proposal for the contractors to provide services with the sexually violent predators, are there persons set out in that proposal, who would do nothing other than act as security guards?

A. No.

Q. Is it correct that in the Department of Corrections portion of the facility, there are no in – people who do nothing but act as security guards?

A. Department of Corrections people, yeah, they have security guards, I guess, I mean as far as I know, they do.

MR. PUNTCH: Your Honor, I ask that the answer be stricken again on the basis of the witness' knowledge.

THE COURT: Yes, sustained, unless he has some personal knowledge of this thing.

Q. (By Mr. Weilert) Who are the two contractors who have submitted bids for this work?

A. DECCA and Prison Health Services.

Q. Okay. Do you have any knowledge whether or not the [p. 62] Department of Corrections has a contract for services with either of those?

A. I believe they do, yes.

Q. With both of them, if you know?

A. At one time or another they have; as to what the current status with DOC and these two providers is, I really couldn't specify. I mean, but I know there have been relations in the past, yeah.

Q. As far as the type of treatment that is proposed to be given to sexually violent predators, does that include some aversion treatments or aversion therapy?

A. It could. It's a lot – I guess I would describe it more as behavior modification.

Q. Does it also include the use of certain drugs, in particular–

MR. PUNTCH: Your Honor–

THE WITNESS: If you're referring to the use of Depo-provera–

MR. PUNTCH: Your Honor, I'm going to object to the form of the question which is vague and conclusive. The PDR is about four inches thick. If there is something counsel has on his mind –

Q. (By Mr. Weilert) Does it include the use of drugs that are used to be considered experimental in [p. 63] nature?

A. We wouldn't use experimental drugs, no.

Q. Okay. And in particular, Depo-provera, do you consider that experimental?

A. It may be experimental, I wouldn't know how to classify it. I know what this is and I know it's used, as to whether it's experimental, but we wouldn't use it.

Q. Okay. And–

Q. Do you have any knowledge, sir, concerning the drug Depolupron, L-u-p-r-o-n?

A. No, I don't.

Q. At the current time, at the Larned facility where the F-4 unit is located, do you know who the mental health provider for the Department of Corrections is?

A. I – I can only conjecture a thought. I think it would be HS–

MR. PUNTCH: I'm going to object to conjecture, Your Honor.

THE COURT: Sustained.

Q. (By Mr. Weilert) Say that a person, if a person was to be committed, say within the next three weeks or so, that the superintendent up at Larned State Hospital would be the person you would or SRS would [p. 64] look to to provide treatment; is that correct?

A. Correct.

Q. Who is that person?

A. Doctor Monte Lee.

Q. Okay. Does that person, to your knowledge, have any expertise in the treatment of sexually violent persons?

A. Not that I'm aware of, he's the superintendent though, it's not expected that he would.

Q. Do you have any personal knowledge whether anyone at the Larned State Hospital has such knowledge?

A. Not specifically, no.

Q. What, under the proposal, you have submitted to these two contractors are the duties of the program director?

A. Under what the original proposal was they – it would be what we call a clinical director and a program director, okay. We felt that since SRS had the legal responsibilities that the program director, the overseer of the program needed to be an SRS employee, because we were going to contract out, we felt that it was important to safeguard the State of Kansas in the program and therefor we changed the program director, what's referred to as the program director, into a clinical director which [p. 65] means that they have responsibility for overseeing the clinical aspects of the program.

Q. Are you familiar with any legislation, sir, that allows SRS to contract out the responsibilities given them by Senate Bill 525?

A. Not specifically, no.

Q. Persons who would be – strike that. You said you went to the facility up in Washington state, I believe, Monroe–

A. Right.

Q. – State Penitentiary?

A. I think that's what they call it, yeah, state penitentiary at Monroe, Washington.

Q. Describe for us the physical facility for the sexual predator division at that location.

A. Okay. On the unit themselves, on the unit themselves, they're like hallways, there's – it's two floors; okay? There's hallways down each side and in the middle there's security, central security location where it's – they have guards in there that, you know, operate the doors, provide the security.

Q. Okay. Are there any Department of Corrections persons in that facility?

A. Inside – on the ward, no.

[p. 66] Q. How about in the same building?

A. Oh, yes.

Q. In – how long were you there?

A. Two days.

Q. How much of your time did you spend actually observing treatment?

A. Couple hours I suppose, several hours, I don't know.

Q. How many individuals were there incarcerated in that unit at the time you were there?

A. I think 24.

Q. Pardon me?

A. I think 24.

Q. Okay. And of those 24 persons, how many did you actually see in treatment?

A. Well, I know this – because I spoke with the staff, approximately half of them are not accepting treatment based on advice of their attorneys. Okay, the rest of them are participating in treatment except for a handful which are there just for the evaluation process, okay. So, I suppose they're – at ten, in terms of how many I personally observed, I don't know. Probably that many at one point or another.

Q. Okay. If you said half weren't accepting treatment and half were, or a handful were there for [p. 67] evaluation, wouldn't that leave about six or seven people actually participating in treatment.

A. I suppose seven or eight, yeah.

Q. In attempting to come up with this request for proposal; is that right?

A. Yes, RFP.

Q. Did you do any research about the – for lack of a better word, success of any treatment program for say a pedophile or a person with pedophilia?

A. I was not involved in the writing of the RFP, okay. I was asked to put the program together after the

RFP was already done. In terms of the people who developed that program, I mean, we had mental health professionals involved in developing that program but in terms of my knowledge, I can't say that.

Q. What's your – let me back up a minute. Your degree, sir, is a masters level in nursing?

A. Health care administration.

Q. Health care administration, okay. Other than your BSN have you done any other, pardon me, had any other education in the field of nursing?

A. Nursing?

Q. Uh-huh.

A. Continuing education, you know, I can't, those kinds of things. In terms of formal college, no, I – my [p. 68] BSN in nursing and I have my Master's in Health Care Administration.

Q. Has any of that continuing education dealt with the treatment of sexually violent offenders?

A. No.

Q. In anticipation of being the program director of this sexual predator treatment facility, have you done any studies to determine whether or not, or determine what the success rate for such treatment facility is?

MR. PUNTCH: Well, Judge, I'm going to object to the form of the question. It calls clearly for hearsay on the part of Mr. Davis, and in addition it's outside the scope of my direct examination. Thirdly, there – he's laid

no foundation that Mr. Davis is qualified to give such an opinion.

THE COURT: Give me your question again, Mr. Weilert.

MR. WEILERT: I think my question was whether he'd done any study to determine the successfulness of any treatment programs.

MR. PUNTCH: Well –

MR. WEILERT: For sexually violent predators.

[p. 69] MR. PUNTCH: That was my next objection.

THE COURT: Let me develop that.

MR. WEILERT: Your Honor, the relevancy is that we're talking about a statute which is, according to the Legislature's Preamble, aimed at treating persons who have some personality disorders or mentally, mental abnormality and, excuse me, if such treatment is not recognized in the scientific community of those providing the treatment then that in effect takes away the treatment purpose of the statute and makes it penal and that's relevant to the question of whether or not these gentlemen have to talk during an evaluation.

THE COURT: Mr. Puntch?

MR. PUNTCH: Well in response, Your Honor, two things. One, I renew my previous objections – this witness, clearly by his previous testimony is not qualified to give an answer and such answer would be clearly hearsay. Second, Your Honor, the statute provides treatment of sexually violent predators doesn't promise a

cure; I don't know that anyone can. It provides appropriate treatment to – to the end that they will be able to manage whatever their sexually predatory nature is and an answer from this witness clearly at this point, Your Honor, [p. 70] would be not only my – my previous objections but I don't understand his competency to answer at this point and irrelevant.

THE COURT: You are the program director?

THE WITNESS: Yes, sir, I'm – that means I'm the administrator.

THE COURT: You're the administrator. The proposals, I have had the opportunity to read it, the proposals cover treatment programs, isn't that what the provider will contract for?

THE WITNESS: It provides framework, yes, sir.

THE COURT: Framework for it. In setting out the treatment program in your proposal, has – have you or SRS relied upon the professional people and psychiatry in that area and mental health to put the treatment together?

THE WITNESS: Yes, sir.

THE COURT: Yeah, I think – I don't think this witness is competent to answer this question, I think you need somebody else. I'll sustain the objection.

Q. (By Mr. Weilert) Mr. Davis, you spoke about a – another facility that I don't – I think you said is in the planning stage where sexually violent [p. 71] predators would be housed at some later point in time?

A. Yes.

Q. What – what kind of time frame are we looking at there?

A. It's – it's in the planning stage right now, I mean, I couldn't give you an idea.

Q. Would it be fair to say that in your experience in the Department of Social and Rehabilitation Services that that could be anywhere from this next year to never?

A. Oh, probably be a couple years, yeah.

Q. Do – does the program have any proposed length of treatment in mind?

A. It's behavioral outcome in nature.

Q. Are you familiar with any programs that are successful – are successful in modifying behavioral outcomes on an involuntary commitment basis, dealing with sexual predators?

A. Oh, dealing with sexual predators, I can't speak to that.

Q. In doing the planning of this program, have you spoken to anyone, any of your advisors in the area of psychology or psychiatry who point to any reasonable, pardon me, to any study where behavioral [p. 72] outcomes of involuntarily committed sexual predators have been changed?

MR. PUNTCH: Excuse me, before he answers, Your Honor, I wish to raise the same objections I raised earlier with the additional objection it's clearly calling for

hearsay, what somebody told him or some other study said.

THE COURT: Well, Mr. Weilert, I'm concerned that his professional background, he's an administrator, and these questions go more to professional people in the – in the area of mental health and psychiatry and so on and seems to me that we're going to go far afield by getting him to discuss whether he had discussed this matter with other professional people or whether any studies have been made. I think it's outside the reality of this witness' expertise.

MR. WEILERT: If I might just put something on the record.

THE COURT: Sure, no.

MR. WEILERT: Not in argument.

THE COURT: No, go ahead.

MR. WEILERT: Mr. Davis has told us that he is going to be the program director for this sexually violent predator unit and it seems probably [p. 73] that the program director would have examined the possible success of that program with mental health professionals and apparently according to his answer, he hasn't done that. The fact that he, pardon me. The fact that the program director does not have any information concerning whether or not such a program is successful in treatment is once again, in our opinion, a consideration that this is in fact a quasi-criminal commitment where there is no reasonable anticipation of a "cure." That's all I had.

MR. PUNTCH: Well, in response to that statement, Your Honor, again, I wish – I should have made

this objection earlier, there has been a legislative finding that sexual predators are in need of treatment in something other than a prison setting, that they need different treatment modalities and that they need long term treatment, so I think counsel's objection's already been addressed by legislative findings in Senate Bill 525 itself, Your Honor.

THE COURT: Well, the objection will still be sustained, but counsel made the record, sure, go ahead.

MR. WEILERT: Thank you, Your Honor.

[p. 74] Q. (By Mr. Weilert) Mr. Davis, this proposal that you identified earlier are, the – I think it's Exhibit A, is that –

THE COURT: One.

Q. (By Mr. Weilert) Exhibit 1, am I correct that you don't have any idea about whether the treatment proposals set forth in that are geared towards a successful treatment of sexually violent predators?

A. The Request For Proposal was written by people who have knowledge of the specification of treating persons with sexual problems. Okay, my job is to make sure that those proposals that we received met the criteria set forth in those.

Q. How are you in a position to judge whether the proposals you've received meet those criteria if you have no knowledge concerning the treatment?

A. Because RFP is written with very objective terms in it, like the qualifications of the staff, okay, cognitive therapy, those kind of things.

Q. Now, do you have a copy of that in front of you?

A. The RFP?

Q. Yes.

A. No, I don't.

THE COURT: He has one right there.

Q. (By Mr. Weilert) Thank you. I'd like to refer you [p.75] to page two.

A. Okay.

Q. Pardon me, bottom of page one, section 10.2.3 and it says, you know, site primary mental health treatment professionals must be at least masster [sic] level psychologist, master's level social worker or master's level psychiatric nurses?

A. Uh-huh.

Q. Treatment professionals should have course work and documented 200 hours (one year).

THE COURT: 2,000.

Q. Pardon me. 2,000 hours' direct clinical working on a sex offender treatment or plan to obtain such course work and or experience. Now, am I correct that that calls for someone who has no experience but says I'm going to get it, all the way up to someone who has in fact 2,000 hours of experience?

A. I can answer the question this way, the specification individuals that were identified, that were named in the proposals, were submitted to us, had experience in sexual treatment programs.

Q. Okay. That – I don't think was my question. The proposal calls for someone with either no experience all the way up to over 2,000 hours; is that correct?

A. Okay, right.

[p. 76] Q. Now, would you agree that someone with no experience is, objectively speaking, someone with no experience not as qualified as perhaps someone with 2,000 hours of experience?

A. Sure.

MR. PUNTCH: Before this, excuse me, the witness has already answered. If you would give me a chance to make an objection, please.

Q. (By Mr. Weilert) So when you say non-professional, pardon me, under Section 10.2.4, non-professional support staff must meet educational requirements to fulfill their assigned duties; is there anything in there that sets forth what their duties are or their educational requirements are other than that section?

A. Yeah, the job description that I've written.

Q. Okay, where's that?

A. In my office.

Q. Okay. That's not in the proposal?

A. No, we're supplying the direct care staff.

Q. Going to the program description, you say that each proposed program shall, under Section 11.1.1, state the theoretical basis for the program, the treatment strategies, the performance indicators, program goals, evaluation tools and other data and or [p. 77] materials available which provide information necessary for evaluating the

proposal. Do you have anything, sir, which sets out objective standards that these theoretical bases for the treatment programs, treatment stratagies [sic] must meet?

A. I'm having trouble concentrating on this, I guess I'm a little flustered being up here.

THE COURT: That's all right.

THE WITNESS: I don't know.

THE COURT: Counsel, why don't we just take about a 15-minute recess anyway. I think it might be a good time.

(At this time a recess was taken, and the following proceedings were reported of record by Connie Uphaus and is contained in a separate file.)

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[p. 14] D.O.C. inmates and patients under S.R.S.?

A We are planning not to, no. I have been meeting with the warden at Larned Correctional. In fact, yesterday I was there, so we can establish how we are going to vary the times so they won't be intermingled any more than necessary. In terms of eating, you cited they will be accompanied by S.R.S. staff and eat in a separate part of the dining room, separate from the inmates.

THE COURT: Okay. Counsel, I may have opened something you want to follow through on. Go ahead.

MR. PUNTCH: No, Your Honor.

MR. WEILERT: It is the same dining room?

A Yes.

THE COURT: If he needs to leave, is there any problem with him leaving if he needs to?

MR. PUNTCH: No, Your Honor.

THE COURT: Thank you, sir.

MR. PUNTCH: Mr. Cummings, Your Honor.

WILLIAM CUMMINGS,

called as a witness on behalf of the Petitioner, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. PUNTCH:

[p. 15] Q Tell us your name for the record?

A William Cummings.

Q Mr. Cummings, what do you do for a living?

A I am with Kansas Department of Corrections with Central Office.

Q And what is your job title?

A Corrections manager, risk management.

Q What does that include? What do you do?

A Well, it encompasses a broad range of the issues including resolution of inmate complaints, appellate

review of inmates' disciplinary action, review resolution of complaints issued by families, employees, employee grievances, manage the furlough program, transportation program. I was asked to assist in developing the Department's participation in the sexual predator program.

Q And you are familiar to that extent, at least, of your participation with the Department and the sexually violent predator treatment program?

A Yes.

Q And as a result of the myriad job duties which you have, have you had to become familiar with all of the correctional institutions under the Department of Corrections here in the State of Kansas?

A Yes.

[p. 16] Q Would that include in addition the Correctional Facility at Larned?

A Yes.

Q What is the Correctional Facility at Larned?

A A correctional facility that is geared to address the mental health needs for the needs of those inmates that have need of intensive mental health treatment.

Q Is the facility there at Larned different from your other operations?

A Yes. The program there is geared toward mental health treatment.

Q How about the facility, the natural physical facility in the hospital at Larned, have you ever been there?

A To the correctional facility?

Q Right.

A Yes.

Q Have you seen the wards there at the correctional facility?

A Yes.

Q How do the wards there at correctional facility compare with, say, medium security prison. Are they any different?

A Not greatly. There's sleeping rooms and day rooms. In terms of a medium security facility, at most of our medium security facilities, the inmates don't have [p. 17] individual rooms, don't have individual sleeping rooms. At the mental health facility, they do. At one medium facility at Lansing, they do have individual sleeping rooms. Other than that, they don't. The rooms are obviously lockable at Larned. They have very, very nice day room facilities available right there within the housing areas, very spacious, providing inmates with an opportunity for interaction.

Q You were here when Mr. Terry Davis testified, weren't you?

A Yes.

Q And remember when he listed some specific rights that people committed under the mental health statutes have; do you recall that?

A Yes.

Q The very first one was the right to wear your own clothes?

A Yes.

Q When you are committed to the Department of Corrections and you are in a Department of Corrections facility, you get to wear your own clothes?

A No. I might make an exception to that. At a work release facility where obviously the program slant specifically would require that at a work release [p. 18] facility where the inmate actually works in the community, but in the facility of the CMR custody classification, it would not be allowed to.

Q Let's try to compare apples with apples, the same place security classification as psychological there at Larned?

A Like Larned Correctional Mental Health Facility?

Q Right.

A They are not permitted to wear their own clothing.

Q Are they permitted to have their own money?

A They are not permitted to carry money at all. They have limited access to limited funds to purchase limited items within the commissary, very limited items at the commissary.

Q Would they be able at a security facility similar to Larned Hospital to be able to order a tie from the Land's End Catalog?

A No.

Q Of the other rights that Mr. Davis talked about, do you notice the differences between rights of people who are committed under the statute for commitment of mentally ill persons and people who are sent to prison; any others that stuck out in your mind that he discussed?

A Yes.

[p. 19] Q Can you tell what those are? Well, I think the problem that probably stands out in my mind the most, correct me if I am wrong, if there was a prohibition on doing work, involuntarily performing work?

A Yes.

Q Yes?

A Compulsory work program is basic part of correctional treatment program. Kansas Administrative Regulation 44-12-401 requires that an inmate perform whatever work he is assigned to.

Q Any others that you recall now that stick out in your mind?

A I believe that the patient can receive sealed – can send and receive sealed letters. I believe that was part of that.

Q How does that work in the penitentiary?

A Well, any inmate mail except legal mail and official mail can be opened and read, opened, searched and read, opened and searched at any time, read with the consent of the warden. Official mail or legal mail, that is any mail that's from an attorney or from any other person

with whom the inmate would have a right to private consultation, would be opened and searched in the inmate's presence, but certainly would not be given to them sealed. In addition, he can search any [p. 20] mail that is found to fall within our guidelines for censorship.

Q What about personal property, any limitations on personal property that an inmate in prison can have?

A We have a list of property that inmates are permitted to have and that list we view as being relatively conservative in comparison even to other correctional systems.

Q What about daily visitation for people in prison, are they allowed daily visitation with people?

A No. Normally at most correctional facilities, I am thinking it's in the range of a half day during the week and a half day on the weekend or possibly a day, an all-day visit if they get approval in advance for visitors coming from a particularly long distance. In some of the work-related facilities, they are not permitted visits during the week because they are required to work during the week and not allowed to leave the work site to go to a visit. The compulsory work program would take precedence over a visit during that time period.

Q Do people in prison have a right to a furlough? You say you deal with furloughs?

A Yes.

Q Is there a right to furlough in prison?

[p. 21] A No.

Q When is a furlough given? How do you give furloughs?

A Could you run that by me again?

Q If it's not a right, you can't walk in and demand a furlough; how can you get one?

A We have a policy that controls the conditions under which an inmate may apply for a furlough, and those conditions are very restrictive in terms of the inmate. The inmate must be minimum security status. The inmates, if they are convicted of certain violent offenses, they must have met with the parole board at least once. They must demonstrate that they have a sponsor. The sponsor is thoroughly investigated to assure that the sponsor is appropriately responsible. We contact the district attorney's office, the sheriff's department, the police department, to see if there are any objections to granting a furlough. The victim, if it's a violent offense, the victim is given an opportunity to comment. And if after all of these hurdles, if the warden approves that, then it is submitted to the Kansas Department of Corrections central office where I stand in final judgment.

Q Are you required to give anybody a furlough?

A No.

Q It is a matter of privilege, not a right?

[p. 22] A Absolutely.

Q And for any furlough that's granted, are you required to assess the risk involved in releasing that person on furlough?

A Yes. We do a thorough review of all records that are relevant.

MR. PUNTCH: There is nothing further.

THE COURT: Cross please.

CROSS-EXAMINATION

MR. GREENO:

Q Mr. Cummings, what's been your involvement in this particular senate bill, can you expound on that a little bit? What was your particular involvement with the Department of Corrections on this particular bill?

A Participated in – primarily participated in meetings with Department Secretary facility management and the other agencies that were – and the other agencies that participated or that had been involved in this process, and primarily we had been looking at process that in the future will be used to assess the process by which we will notify the county attorneys of the inmates that are being released that fall within the purview of the statute.

Q Were you involved in the Secretary or the Department of Corrections' participation and implementation of [p. 23] this particular program or things that are going to affect the Department of Corrections as far as implementation of senate bill, i.e.? Let me be more specific?

A Yeah.

Q When you were notified or Department of Corrections was notified that these actions had been filed here in Sedgwick County and there was going to have to

be evaluations conducted, these people were still technically under the custody of the Department of Corrections; is that correct?

A That is correct.

Q Did you participate or help in the decision-making process of where they were going to be evaluated and what circumstances were going to surround that evaluation?

A No. At that point, no, I wasn't.

Q So when they left here and went to Larned State Hospital for the evaluation, the Department of Corrections had nothing to do with it?

A That is correct.

Q What procedure was used or if you are familiar with the Department of Corrections relinquishing control and custody of these other individuals for that period of time, was it a formal agreement?

[p. 24] A I don't believe I can answer that question.

Q Would somebody in the Department of Corrections know the answer to that?

A I believe they would, yes.

Q Who would that be?

A I think I would have to refer to legal counsel.

MR. PUNTCH: I will object to relevance of the question for purposes of this hearing. It sounds like discovery to me.

THE COURT: I will allow it.

A I think I would refer it to our chief legal counsel, Tim Madden, in terms of the exact procedure.

Q Now, the Department of Corrections has many different custody levels; is that correct?

A Yes.

Q Ranges from maximum to minimum?

A Yes.

Q And if I understand, you compared the facility at Larned that the Department of Corrections has, you compared that to a medium security; is that correct?

A No.

Q How could you characterize that?

A Maximum.

Q And in that maximum setting, what makes it a maximum setting?

[p. 25] A Primarily the exterior, perimeter and the internal movement controls. The inmates are secured in their cells or can be secured in their cells when they are not actually participating in a treatment program and they are secured in an individual cell.

Q But they also have access to recreational programs like baseball diamonds and weight rooms?

A Under supervision, yes.

Q Under supervision, okay. They go to the dining hall, et cetera, et cetera?

A Under supervision.

MR. PUNTCH: Excuse me, I object to the form of the question because I am not sure what et cetera, et cetera means.

MR. GREENO: That's okay. I will withdraw that portion of my question. Okay.

THE COURT: Fair enough.

Q Now, then the perimeter security that you talked about that also makes this a maximum security facility, that's the same perimeter that will be in effect when that particular person becomes a part of the sexual predator treatment program?

A That is correct.

Q Now, the Department of Corrections has a sex offender treatment program; is that correct?

[p. 26] A Yes, we do.

Q And you would term that as – well, tell me what kind of program is it?

A Well, it is a sex offender treatment program and it lasts approximately a year. In terms of characterizing the specific modes of treatment, I am not qualified.

Q This morning when we were talking to you, you called it intensive treatment?

A That is primarily their focus of their day's activity, inmate's activity. When in speaking in terms of intensive program, it's not something like I go to for an hour in the afternoon or in lieu, in addition to a lot of other

activity. That becomes primarily the focus of their activity.

Q Those sexual offender treatment programs that you have that last for a year, are they all in maximum security facilities?

A No.

Q Are any of them in maximum security facility?

A Yes. One is at Hutchinson Correctional Facility.

Q How many of them are in medium security facilities?

A I don't believe any of them. I think we have one.

Q Do you have any at minimum?

A Yes.

[p. 27] Q How many?

A One.

Q So you have one in maximum and one in a minimum?

A Yes.

Q And that's all?

A To my knowledge, yes.

Q People that go to those sexual offender programs, are they the people that are convicted of sexually violent crimes as per the Senate Bill 525?

A As set forth – well, that would be a prime consideration in someone being referred to that.

Q People that have committed those kind of crimes that are mentioned in the senate bill, are you familiar with that portion of the bill?

A Yes.

Q They sometimes receive minimum custody; is that correct?

A Yes.

Q They sometimes receive work release; is that correct?

A Yes.

Q So while they are in custody of the Secretary of Corrections, they are able to go outside the walls of the penitentiary; is that correct?

A Sometimes.

MR. PUNTCH: I wish to raise the objection of [p. 28] relevance; what happens to them in the custody of the Secretary of Corrections.

THE COURT: What do you say, Mr. Greeno?

MR. GREENO: What we are talking about here is whether or not the statute is penal or civil commitment, and the statute particularly talks about the needs for secure environment for the treatment of these particular individuals. When these particular individuals are in a less-restrictive setting prior to the commitment under this particular civil statute, their access – they have more rights or more liberties than they would have under this

particular statute. It is deemed appropriate by the Secretary of Corrections to let them have these particular liberties, but when it is found they are sexual predators under the statute, no, sir, liberties are curtailed and it becomes penal in that nature. And if it is not necessary for this type of restriction to curtail their criminal activity, then it is in fact penal.

THE COURT: But the Legislature has distinguished these two classes, and what you have lumped in your question with Mr. Cummings, you are talking about those individuals who are confined under D.O.C., and they have been convicted of a sexual [p. 29] offense, rape or molestation, whatever, and they may not be the same ones that we are talking about here. They may be coincidentally, but it has not been determined yet that these are, these people you are referring to, are considered quote within this S.B. 525, sexually violent predators. I would have to sustain the objection because they are being treated differently because they are in a different category. They are under D.O.C. commitment. They are actually under court commitment as I understand there, and here we are talking about S.B. 525 moving them into, at least from what the bill says, into a treatment mode. I think you are lumping. I would sustain the objection. You are lumping too many all these people that are confined into a category of sexually violent predators and that's not the case here at all, at least from what I understand. Try it again.

MR. GREENO: I will step back.

Q You understand we are talking about people who have been convicted and in the custody of Secretary of

Corrections as sexually violent crimes in Senate Bill 525; do you understand that part?

A Yes.

Q And under the Sexual Predators Act or 525, there's another component, whether or not these people suffer [p. 30] from a mental abnormality or personality disorder?

A Uh-huh.

Q Do you understand that portion?

A Yeah.

Q The Secretary of Corrections or the Department of Corrections has mental health components that work with sexual offenders; is that correct?

A That is correct.

Q And that component, that treatment program is to treat people who have sexual deviant problems; is that correct?

A Yes.

Q And would it be a fair statement to say that a large portion of those people may suffer from a mental abnormality as contemplated by that particular statute?

MR. PUNTCH: Before you answer, let's get foundation for him to testify to that.

THE COURT: Yes.

Q What do you know about the sexual offender treatment program with Department of Corrections?

A Basically that it is a year program that becomes a primary focus of the inmate's activity. It's a long term. It's available in those locations. In terms of specifications of the program, again I am not [p. 31] qualified to talk about the specific treatment modes or exactly what it is they are doing.

Q Are you qualified to tell us about which individuals are targeted for those particular programs?

A In terms of referral to the program or assignment?

Q Referral to the program?

A In terms of referral to the program, it is an issue that's taken up at reception and diagnostic unit, it becomes a part of their program agreement. And again certainly conviction of sexually violent offense is a strong recommendation, but there are other issues that play into that, including length of time the inmate has to serve and so forth.

Q The reception and diagnostic center you mentioned, and that is part of the process of being referred to this program; is that correct?

A To the sex offender treatment program within the Department?

Q Yes.

A Yes.

Q That facility, as I understand it, is a psychological arm or component of the Department?

A It is an evaluation unit.

Q And they do psychological evaluations there; is that correct?

[p. 32] A Yes.

Q The inmates when they go through that, they see social workers?

A Yes.

Q And they see psychologists?

A Yes.

Q And sometimes see psychiatrists?

A Sometimes.

Q And those particular people, when they see them, they do psychological tests?

A They do testing, yes.

Q They do staffings of the people that have interviewed and done the testing, those people will get together and make a recommendation?

MR. PUNTCH: Your Honor, I will object to this line of questioning. What's the relevancy of what happens?

MR. GREENO: We are talking about the other components of Senate Bill 525, whether they suffer from mental abnormalities. My contention is if they go to a facility designated by Department of Corrections to be questioned by psychologists or a social worker and psychiatrist and make a recommendation for sexual offender, an inference can be made the mental abnormality is as broad as that [p. 33] word is.

THE COURT: The Court can't make that jump for you, what you are talking about. Those – again, those inmates have been convicted of sexual offenses and diagnostically they are sent into a program so that they can get some treatment, but there's no showing at that point of whether this witness would be able to have the expertise to show about the violent offenders you are talking about. He has not been, at least at that point this witness is not capable. They have not been ascertained as falling within the classification of Senate Bill 525 proposes. Those are different programs completely, different classes of people. At least at this point, been no diagnosis that these sexual offenders that Mr. Cummings has talked about are being designated – have been designated sexual violent predators. I will sustain the objection here. We are talking about apples and oranges.

Q Visitation at Larned that the Department of Corrections has, they have rulings; is that correct?

A Yes, but I am not familiar with them specifically. They do have a policy regarding visitation, but I am not specifically familiar with it.

Q So you don't know if that's the same that is in the [p. 34] rest of the other correctional facilities?

A It varies from facility to facility, undoubtedly different.

Q So they may have access to daily visitation and you are not aware of it?

MR. PUNTCH: Objection. They may have pie in the sky that he is not aware of either. It's irrelevant.

MR. GREENO: He testified that they have daily visits.

THE COURT: Well, he did say that. Well, I amplified it.

A Yeah.

Q Do you know that they don't have daily visitation at Larned Correctional Mental Health Facility?

A I haven't reviewed their specifics, but in general in the Department, no, daily visitation is not permitted.

Q You don't know for a fact they don't have it there, though?

A No, I don't.

Q Okay. Are they allowed to have any other items that the other correctional facilities are not allowed to have?

A Not that I am aware of.

Q You can't have radios?

[p. 35] A Yes, they can.

Q You can have TVs; is that correct?

A Yes, they can.

Q Are they allowed any subscriptions to any magazines?

A They are allowed to subscribe to magazines.

THE COURT: You are talking about D.O.C. people?

MR. GREENO: D.O.C. people.

THE COURT: They don't have a right to all magazines?

A They can have a subscription to –

THE COURT: Unless they changed it since I have been Secretary of Corrections, they are limited to the number of magazines they can have in their possession in terms of reducing fire warning.

THE COURT: Can they subscribe to Playboy and Blueboy?

A They can subject to censorship if they are found to be obscene.

THE COURT: Okay. Well, I want to make sure we understand what we are talking about when they ask you whether they are allowed to have magazines. They are, but they can't subscribe to all magazines because of regulation, if it is obscene material.

A Well, again, it is subject to censorship.

THE COURT: I wanted to make sure that's clear. [p. 36] All right.

Q On direct examination you painted a fairly restrictive environment as far as some of the liberties and what they can do as far as property they can own. Money. They can't have any money?

A In their possession, yeah.

Q But they can have money on the books?

A They can have, yeah, they can have money in an account that they can use at the facility canteen or to buy items from this limited list that the Department has.

Q This limited list, what is that?

A Set forth in our policies. I don't know the entire list off the top of my head.

Q What would someone not be able to buy that's not on the list?

A Well, articles of clothing primarily. The inmates have to wear institutional clothing. I think the example drawn previously was that they couldn't order a tie from Land's End Clothing. The electronic equipment is limited pretty much to the items you mentioned, radio or television. They obviously can't order in electronics equipment. It's again, that list is an inclusive list of all items that they can have, and anything off of that list is not permitted. And, again, our research of property showed that that's a [p. 37] conservative property policy and we believe it to be a conservative property policy.

Q Well, regardless of whether it is conservative by your standard or some other department standard, have you compared it to the policy of Secretary of Social and Rehabilitation Services in regard to mental patients?

A No, other than what Terry had told us today.

Q Were you aware that some of the inmates from the Department of Corrections that were brought in under this action were sent to Larned State Hospital?

A Yes.

Q And do you know where they were sent at Larned State Hospital?

A Yes. I was told it was the Jung Building.

Q And do you know what ward they were on?

A No.

Q Were you familiar with the security that was implemented?

A I have never seen it.

Q Did you get any information about who was going to look after them and whether or not they will be able to escape or anything like that?

A No, not personally.

Q Who provides the penal health counseling for the Department of Corrections at the Larned Correctional [p. 38] Mental Health Facility?

A I believe Prisoner Health Services.

Q How long have they been doing that?

A They got that contract in July.

Q Before that, did they do it as a subcontractor?

A I believe, yes.

Q And who did they work for?

A Consortium.

Q The Mental Health Consortium?

A Yes.

Q You heard the previous witnesses, the two people that had submitted bids for mental health treatment, did you hear that?

A Yes.

Q Is that the same Prison Health Services?

A I believe that is.

Q How many people with the Department of Corrections have been subjected to this statute so far that you know of?

MR. PUNTCH: What is the relevance of that question?

THE COURT: What is, counsel?

MR. GREENO: Well, I am curious. I am going back. I got to admit I am going back to where I was before. There's got to be some connection between the

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DISTRICT COURT'S ORAL FINAL RULING THAT PROCEEDING IS CIVIL NOT CRIMINAL (TRANSCRIPT OF PROCEEDING OF 9/23/94)

[p. 69] that someone will do certain things in the future, whether it is likely that anyone committed under the statute will ever be released.

THE COURT: All right. Maybe then let's plan on 1:15. Give you more time to go over the material, too.

MS. FOULSTON: How about 1:30?

THE COURT: Any problem with 1:30? Let's recess till 1:30. And would the deputies have the respondents back here back at 1:30, please. Your Honor, there are several other topics and arguments to be made. The fact this is a violation of equal protection that the legislature has seen fit to target individuals who have only.

MR. WEILERT: Should we put on the record that Ms. Shaneyfelt had a 1:30 hearing of some sort, I think. And so we will be acting in her stead.

THE COURT: Okay. She mentioned that I think she's with Judge Helsel. She said it would just be a few seconds. Is it all right to proceed, though?

MR. WEILERT: Yes, sir.

THE COURT: All right. The respondents are brought into the courtroom at the present time. Let the record show counsel all present. Court is now ready to rule on the issues that have been presented to [p. 70] the Court. First of all, I certainly want to show my appreciation of both sides and the way we really moved on this fast track to get all these things before the Court. And there were a lot of issues which need to be resolved and

unfortunately if we had more time, perhaps maybe we could get into more in-depth matters, as far as how to resolve these issues. The other things I apologize that because of time restraint's gonna be almost impossible for me to prepare extensive findings of fact and conclusions of law so that in the event an appellate record is made that at least the appellate court would have more extensive findings. But because of the time restraints – And if my computation is correct that we have the forty-five days to be concerned about, which falls on the weekend of October 1, which means October 3 – But the Court is ready to rule. And I think the first thing I should rule upon, which takes care of a lot of the other issues – And that is the question of whether this proceeding is quasi criminal in nature. The Court has already ruled this proceeding is civil in nature. But the Court didn't allow respondents to present additional briefs, briefing on the issue of quasi criminal proceeding on the basis that if – not withstanding the Court's finding of a civil proceeding – if the environment of [p. 71] the persons involved in this statute is so punitive and that punishment is really the focus rather than the matter of treatment or an environment which is not aimed at punitive measures, that perhaps the Court should consider the matter that it is not civil in nature but more quasi criminal, which in essence would be criminal. The second point respondents made is that in reading the statute and then with the deposition of Dr. Befort(sp), which the Court read earlier, and the other contentions that are made by respondents, that in essence the statutory language does talk about treatment therapy programs. But in essence if anything it's just a sham; that there is no treatment program; that if

there is any kind of a program, it's ineffective. There's not enough reliability in the sense of that these people, assuming they have this diagnosis such as the sexual violent predator, that really they're gonna be able to be treated fully. And therefore actually what we're doing by the statute is just warehousing these people. In essence that's the gist of it, although it's more detailed than that. The Court has considered this and finds that the respondents have not sustained the burden to show this is quasi criminal or criminal in nature. The earlier finding that it is civil in nature still holds. And to [p. 72] support that finding, the Court did review the testimony which was presented last week with Mr. Adams, Mr. Cummings; Mr. Adams being with S.R.S.; Mr. Cummings being with with D.O.C. And the Court reviewed the testimony concerning the environment; and the Court is satisfied that there's a clear separation, clear distinction between the inmates under the Department of Corrections and these persons under the jurisdiction of the S.R.S., and the fact that these persons under this statute are confined in a prison setting, whereas Larned is part of the D.O.C. facility, that in itself doesn't make this procedure constituting a punishment focus or punishment aspect. When I look at all the other things, the differences between the rights of the these parties, these persons under S.R.S., their personal rights are different. They are in a different classification than the prisoners under the D.O.C.; that the only relationship involved in the D.O.C. is the security that's provided; but that too doesn't take it out of the civil proceeding in nature, where they have no involvement whatsoever in any treatment program. The Court feels that it is civil in nature and that the respondents have

failed to satisfy the Court in regard to the matter of whether it is or is not quasi criminal. With that finding, then, the Court [p. 73] feels that the civil procedure applies in the matter of discovery. And although discovery provisions under the code, such as endorsement of witnesses, exchange of witnesses, exchange of expert reports, are all involved and will be applicable in essence because the Court finds on the basis of its civil nature this proceeding is there is no privilege against self-incrimination. There is no privilege as far as the physician-patient under 60-427, nor under the certified psychologist privilege under 74-5323, nor the privilege concerning care and treatment facilitates under 65-5602. The Court further finds on the basis of its ruling, this is civil in nature, that due process question's raised, such as double jeopardy, vagueness and overbreadth of the statute, the denial of equal protection, the claim of ex post facto, Bill of Attainder, the privilege against self-incrimination, the Court finds none of these are involved because it is of a civil nature; and that there is sufficient protection under the substantive as well as procedural due process that the statute – Without me repeating it, the statute sets out the procedural due process concerning the treatment program, the right to come back in for hearings to determine whether or not the person is any – is no longer a danger to himself or to society. The equal [p. 74] protection argument is denied in the sense this Court finds that there is a separate, distinct classification of those persons who have been convicted of violent sexual offenses; in this case, those that are under this statute sexual violent predators are separately situated as far as any combined – whereby they should be treated the same way. There is a

distinction here in these situations. The Court further reviewed Dr. Beckfort's deposition, particularly as he referred to pages 612 concerning the problem which follows. This really is not a treatment program, no matter what the statute says; and the Court is aware from just general experience that predicting future behaviors and predicting cases of this nature that we're talking about that there is a split of opinion, differences as to the prognosis. But the Court is satisfied from the case that just because of that – does not make it inadmissible evidence as to what is the objective and the purpose this statute. So at this point the Court will make no finding that there is no reliable criteria in this case to decide that in essence there is no valid constitutional treatment program. In essence, obviously, as I said earlier, this is gonna be a conclusion that has to be reached somewhere along the way after the testimony is presented. As counsel well

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TRANSCRIPT OF PROCEEDINGS OF OCTOBER 3-5, 1994 (JURY TRIAL)

[p. 204] MS. FOULSTON: State calls Leroy V. Hendricks.

LEROY HENDRICKS called as a witness, having been first duly affirmed, testifies as follows:

DIRECT EXAMINATION

BY MS. FOULSTON:

Q. Please state your name for the Court.

A. Leroy Hendricks.

Q. Mr. Hendricks, I'm going to ask if you could move that microphone closer to you, sir, so that we can hear you. I note, sir, that you wear a hearing aid. Is that correct?

A. Yes.

Q. If at any time you have difficulty in hearing my question, would you please let me know?

A. Yes, I will.

Q. Can you hear me okay?

A. Yeah.

Q. Thank you. Mr. Hendricks, you are fifty-nine years of age?

A. I am sixty.

Q. You are sixty now. When was your birthday?

A. 27th of September.

Q. Of what month?

A. Of September.

Q. So you have just only recently turned sixty?

[p. 205] A. Yes.

Q. Where were you born, sir?

A. Melbank (sp), South Dakota.

Q. And who are your parents?

A. Violet Hendricks and James Hendricks.

Q. And are they still living?

A. My mother is.

Q. And her name is now?

A. Violet Toolastra (sp).

Q. Where does she live?

A. Hiawatha.

Q. Do you have any brothers or sisters?

A. I've got two brothers.

Q. And were those the only children that were born of the union of your parents?

A. No, I had an older brother that died in 1974, I believe.

Q. And your other two brothers?

A. They're still alive.

Q. In terms of your family history, what number were you in birth order?

A. Number three.

Q. Do you report that you had a normal childhood?

A. I would call it consider it that.

Q. And did you have any abnormal sexual urges as a child, say, before the age of thirteen?

[p. 206] A. Not that I can recall.

Q. Can you recall the relationship that you had with your mother?

A. Normal. We still have a good relationship.

Q. And was part of the normal relationship with your mother her desire to raise you as a girl?

A. Yeah, she tried.

Q. And you consider that to be normal that your mother wished to raise you as a girl child?

A. It happened in other families same time we was there.

Q. And was there any indication by your mother that she wished to have you castrated?

A. No.

Q. Did your mother wish to have you wear girls' clothing?

A. At times up until I was about five.

Q. Did she have you or wish to have you wear bras at a later point in your live [sic]?

A. Yes.

Q. And this is all included within what you consider to be your normal childhood?

A. Yes.

Q. Was any other conduct of this nature directed at your three other brothers?

A. No.

Q. You left home when you were a teen-ager. Is that [p. 207] correct?

A. Yes, ma'am.

Q. Approximately seventeen?

A. Seventeen.

Q. And where did you go?

A. United States Air Force.

Q. What rank did you hold?

A. Airman second.

Q. How did you end up at the McConnell Air Base. Were you assigned here?

A. I was assigned here.

Q. What age were you at that time?

A. Seventeen.

Q. Now, Mr. Hendricks, before you left home at the age of seventeen, had you engaged in any sexual behavior?

A. I don't recall.

Q. Did you have any relationship with a niece at the age?

A. Yes.

Q. When you were fifteen?

A. No, that would have been a cousin when I was, I think, four or five, if I remember right.

Q. She was four or five?

A. I was four or five.

Q. And your the cousin was what age?

A. Oh, I don't remember, ma'am. She had to have been a [p. 208] teen-ager.

Q. Sir, are you suggesting that you were four or five; and your cousin was fifteen?

A. Yes.

Q. As opposed to the fact that you started when you were fifteen; and your cousin was younger?

A. I don't have any cousins that was – that was anywhere near when I was a child.

Q. What did this sexual behavior consist of?

A. Her fondling me.

Q. Was there any other sexual activity that you had before the age of seventeen that you recall?

A. Not that I can recall.

Q. Was there any sexual activity with your mother – father?

A. No.

Q. What about with your mother?

A. No.

Q. Did you believe that there was anything different about yourself in terms of sexuality at the time of your being in the age group of about seventeen?

A. Other than I was shy; I was afraid of girls.

Q. Did you find yourself attracted to children at that age?

A. No.

Q. Was it at a later age that you first became attracted to children?

[p. 209] A. Yes.

Q. And directing your attention to your stay here at McConnell Air Force Base, how long were you in this community at that time?

A. Oh, I was – I come here in '52, and I left McConnell in '56.

Q. And was there a time that you were discharged from the service?

A. Yes.

Q. And were you discharged from the service dishonorably?

A. No, I was not.

Q. It was an honorable discharge?

A. I had an honorable discharge under undesirable conditions.

Q. And the undesirable conditions were the fact that you had been convicted in municipal court here in our city of exposing yourself to two little girls. Is that correct?

A. Yes.

Q. I'm going to show you a photo marked January 12th, 1956. Can you identify the person in this photograph?

A. Yes, that's myself.

MS. FOULSTON: For reference, that has been marked State's Exhibit Number Seven.

BY MS. FOULSTON:

Q. The circumstances surrounding the taking of this [p. 210] photograph involved an incident back in 1955 when you approached two girls. Is that correct?

A. Correct.

Q. And you were attracted to those two girls, weren't you?

A. Yes, ma'am.

Q. And you exposed your genital organs to the two girls?

A. Yes.

Q. Is that correct? And you invited them to enter the vehicle with you, did you not?

A. I don't remember that, no.

Q. And you had a desire sexually for the little girls, didn't you?

A. Only to expose, I think, at that time.

Q. You were convicted by plea on January 13th, 1956. Is that correct?

A. I believe so.

Q. And you were fined $2.90. Is that right?

A. I don't remember the fine, no, ma'am.

Q. I'm going to hand you Petitioner's Exhibit Number One from Municipal Court of the City of Wichita, showing a plea of guilty to the charge of indecent exposure and ask if you recall ever seeing a document of that nature?

A. No, ma'am, I do not.

Q. You took no care and treatment of a psychiatric or psychological nature as a result of your conviction for [p. 211] exposing yourself to the two young girls, did you?

A. No.

Q. You were discharged from the service and left the area of Wichita. Is that correct?

A. No, I stayed in Wichita until 1958.

Q. Did you expose yourself to any other children between the time of your conviction and the time of your leaving Wichita?

A. No.

Q. Were you attracted to any children during that time period?

A. No, ma'am.

Q. Did you have any urges to be involved with any children during that time period?

A. I can't recall. That it's been too far away.

Q. When you left the City of Wichita, where did you go?

A. Cedar Rapids, Iowa.

Q. And what happened in Cedar Rapids, Iowa?

A. I was arrested for lewdness.

Q. Tell us what happened.

A. That was a strip poker game that there was a fourteen-year-old girl there. We didn't realize she was fourteen. And I was arrested and given six months.

Q. I can't hear you, sir.

A. I was arrested and given six months.

Q. Did you serve any time as a result of that?

[p. 212] A. Just six months in the county jail.

Q. Did you take any treatment as a result of that?

A. No.

Q. Did you change your behavior as a result of that arrest?

A. Yes.

Q. When you changed your behavior, did you also change your environment to Spokane, Washington?

A. Yes.

Q. Do you recall what type of work you were doing in Spokane?

A. I was working for a carnival.

Q. Now, a carnival would be where children would come. Is that correct?

A. Yes.

Q. And did you have children – contact with children on a regular basis?

A. No.

Q. Did you have sexual desires towards children?

A. Yes.

Q. Did you have any normal adult sexual relationships with anybody of the opposite sex?

A. Oh, yes.

Q. What was your marital status?

A. At that time we was separated.

Q. And you had been married, had you not?

[p. 213] A. Yes.

Q. And as a result of your exposing yourself to the young girls in Wichita, your marriage had some difficulties, didn't it?

A. No, ma'am. It was not that.

Q. You had some children, did you not?

A. Yes.

Q. And by that marriage, those children – How many of them?

A. Two.

Q. And did you continue to be the father to those children and live in the home with them?

A. Run that by me again. What do you mean?

Q. Was there a time when the children were – left your home and went to live with someone else?

A. When I was in jail, yes.

Q. Now, directing your attention back to being a carnival worker, what did you do for the carnival?

A. I was a ride foreman.

Q. And that would be people – Kids would come on rides?

A. That would mean – Yes, but I didn't have anything to do with that.

Q. But, nevertheless, you did meet a seven-year-old boy and an eight-year-old boy at the carnival. Is that correct?

A. Yes.

Q. And that would be a Steven McPherson and David Erebeznic?

[p. 214] A. I don't remember the names.

Q. You don't remember their names, but do you remember the activity?

A. Vaguely. I can remember some of what happened, yes.

Q. Do you remember that vaguely something being that you molested those two boys?

A. Yes, ma'am, I do.

Q. And that in August of 1960, on the date this happened or sometime shortly thereafter, you were arrested for that, were you not?

A. Yes, I was.

Q. I'm going to show you State's Exhibit Number Eight and ask if you can identify the person in this photograph?

A. Looks like myself.

Q. And is this a photograph taken of you in 1960 in Spokane County Jail in Spokane, Washington?

A. Yes, ma'am.

Q. Is the photograph that was taken after you molested the two boys seven and eight years of age?

A. I believe it is.

Q. And you chose these two boys, did you not?

A. Yes.

Q. And you physically molested them?

A. Yes, ma'am.

Q. And you went to jail for it, did you not?

[p. 215] A. Yes, ma'am.

Q. You went to Walla Walla, Washington?

A. Yes, ma'am.

Q. To the penitentiary?

A. Yes, ma'am.

Q. And did you receive any treatment as a sexual offender in that penitentiary?

A. No, ma'am.

Q. Did you request any treatment?

A. No, ma'am.

Q. Did you believe you had a problem?

A. At that time, no, ma'am.

Q. Now, by this time you had had involvement with two boys, and two, three girls by this count within those years of 1956 through 1960. Is that correct?

A. Yes, ma'am.

Q. Were there any other children you had sexual contact with during this period of time that you were not caught?

A. No, ma'am.

A. You got released from Walla Walla. You got a twenty-year sentence; but you were released on November 13th of 1962. Isn't that correct?

A. That's right.

Q. And you left Spokane, Washington, didn't you?

A. Yes, ma'am.

[p. 216] Q. You went to Seattle?

A. Yes, ma'am.

Q. Did you have family in Seattle?

A. No, I lived there as a child.

Q. You wanted to get out of Spokane?

A. No, they sent me to the penitentiary. And from there Seattle accepted me on parole.

Q. So when you were on parole, you were supposed to abide by the law, weren't you?

A. Yes, ma'am.

Q. And they told you that if you didn't abide by the law that you would have to go back to the penitentiary, didn't you?

A. Yes, ma'am.

Q. And you knew that you would have to serve the remainder of your sentence, wouldn't you?

A. Yes, yes, ma'am.

Q. And you would have to do hard time?

A. Yes, ma'am.

Q. But the urge for sexual episodes with children got the better of you, didn't it?

A. Yes, ma'am.

Q. So in 1963, you were arrested again, were you not?

A. Yes, ma'am.

Q. And this time you had molested a seven-year-old girl, [p. 217] Constance Jacobson (sp). Isn't that right?

A. Yes, ma'am.

Q. You formed a relationship with her family, didn't you?

A. Yes, ma'am.

Q. And you came to know her by walking around the neighborhood and telling the parents that you were a friend of a neighbor. Is that correct?

A. No, ma'am.

Q. And you took this child, this seven-year-old child; and you engaged in illicit sexual activity with her?

A. Yes, ma'am.

Q. I'm going to hand you what's been marked for identification purposes as State's Exhibit Number Two. And this relates, backing up a little bit, to your conviction out of Spokane, Washington. Have you seen this document?

A. I don't remember seeing this, no, ma'am.

Q. You've seen a lot of legal papers, have you not?

A. Not too many, no, ma'am.

Q. Okay. Back to the Spokane conviction, you were convicted of the crime of indecent liberties with a child, Steven McPherson, and convicted of indecent liberties with a child, David Erebeznic?

A. Yes, ma'am.

Q. And that involved the fondling of two young boys in their genital area. Is that correct?

[p. 218] A. Yes, ma'am.

Q. Now, Constance Jacobson was a child that you molested within a very short period of time after being released from the penitentiary on parole?

A. Yes, ma'am.

Q. And you would take Constance with you on trips away from her home, would you not?

A. Yes, ma'am.

Q. And when you took her on these trips away from her home, you would molest her, wouldn't you?

A. Yes, ma'am.

Q. Tell us how you molested her.

A. Fondling.

Q. What did you do to her?

A. Fondle.

Q. Did you place your fingers into her vagina?

A. Slightly.

Q. Did you place your mouth or tongue on portions of her body?

A. No, ma'am.

Q. Did you think there was anything wrong with what you were doing?

A. I knew it was wrong at that point, yes, ma'am.

Q. Were you unable to control the urge to do that?

A. Yes, ma'am.

[p. 219] Q. Your sexual desires overwhelmed you?

A. Sometimes, yes, ma'am.

Q. Your sexual desires overwhelmed your understanding that you could go back to the penitentiary.

A. No, ma'am. I knew I could go back at any time.

Q. But you still molested the child?

A. Yes, ma'am.

Q. In August of 1963, after your arrest, on April 29th of 1963, you came before the Court there in King County, which is Seattle. Is that correct?

A. Correct.

Q. And you were found to be guilty of the indecent liberties with a child?

A. Yes, ma'am.

Q. And at that time the State filed a motion to temporarily commit you to the Western State Hospital. Is that right?

A. Correct.

Q. They wanted to see if you were a sexual deviant?

A. I assume so.

Q. And so you went to Western State Hospital?

A. Yes, ma'am.

Q. And you went there instead of going to the penitentiary?

A. Yes, ma'am.

Q. And when you got to Western State Hospital, they examined you, did they not?

[p. 220] A. Yes, ma'am.

Q. And they talked to you?

A. Yes, ma'am.

Q. And they tried to work with you?

A. Yes, ma'am.

Q. And they tried to treat you, did they not?

A. Yes, ma'am.

Q. What kind of treatment did you get?

A. Group therapy.

Q. Okay.

A. That was about it.

Q. Didn't help, did it?

A. No.

Q. You were found in April of 1964 to be a sexual psychopath. Is that correct?

A. I don't recall that, no, ma'am.

Q. If the records reflect that you were found to be a sexual psychopath, would you deny the record?

A. No.

Q. You were committed, then, for an indefinite period of time to Western State Hospital. Is that right?

A. I'm not sure it was indefinite, no.

Q. But they found that you were not safe to be at large at that time?

A. Yes.

[p. 221] Q. So they kept you there at Western?

A. Yes.

Q. And you continued in your group therapy?

A. Yes.

Q. Did they give you any medications?

A. No.

Q. The only physical problems you had, you had some difficulty with your hearing aids, did you not?

A. Yes.

Q. Getting batteries, et cetera. But generally no other medication was given to you?

A. No, ma'am.

Q. Regarding your sexual deviancy?

A. No, ma'am.

Q. Did you continue to have urges when you were in the Western State Hospital?

A. No, ma'am.

Q. There were no children there, were there?

A. There was children in the hospital, yes.

Q. You were allowed to have contact with the children?

A. Oh, yes.

Q. Did you molest any children in the hospital?

A. No, ma'am.

Q. In 1965, after spending that time in Western State Hospital, they said you were safe to be at large, didn't [p. 222] they?

A. Yes, ma'am.

Q. And they let you out, didn't they?

A. Yes, ma'am.

Q. And they let you out on the streets of Seattle?

A. Yes.

Q. And that would have been about January 14th, 1965, somewhere in the beginning of that year. Is that right?

A. Yes, ma'am.

Q. Going to show you what's been marked for identification purposes as Petitioner's Exhibit Number Three, the official documents from Washington, King County, Seatle [sic], that show your conviction for the crime of indecent liberties with a child, with Constance Jacobson, age seven, and the judgment and sentence of the Court, giving you a twenty-year sentence. You want to take a look at that.

A. No, I'll take – we aren't – we – We wasn't ever shown anything like that in the State of Washington. The courts would not show it to us.

Q. You knew you had been convicted? You just didn't have the official documents?

A. That's right.

Q. So there wasn't any question you were convicted?

A. Pardon?

Q. There wasn't any question but that you were convicted?

[p. 223] A. No.

Q. Now, you're back on the streets of Seatle [sic]; and you were working, were you not?

A. I was.

Q. And you were doing?

A. I was printing – working in a print shop.

Q. And you had a friend you had met in Western State Hospital, didn't you?

A. Yes, ma'am.

Q. A woman friend?

A. Yes.

Q. And you came to know some of her friends?

A. Yes, ma'am.

Q. Is that correct? And she had some friends that had two little children?

A. Yes, ma'am.

Q. Carol Ann, who was eight years of age and her brother, Richard, who was eleven. Is that right?

A. Yes, ma'am.

Q. So this is around the beginning of January 1967?

A. I don't recall the dates, no.

Q. If the records reflect that between January 2nd of 1967 through the 10th of March 1967, you engaged in carnal knowledge by mouth and tongue with an eight-year-old female child, would that help you refresh your recollection?

[p. 224] A. Yes, yes, ma'am.

Q. And these were children that you would take to the acquarium. Is that right?

A. I don't believe we ever went. Yeah, I might have, yes.

Q. You're gonna have to speak up, sir.

A. I says I might have. I don't recall.

Q. And you would take them away from their home. Is that correct?

A. Yes, ma'am.

Q. And you would perform acts of sexual deviancy on these children. Is that correct?

A. Yes, ma'am.

Q. And this was an eight-year-old girl. Is that right?

A. Yes, ma'am.

Q. And you would place your mouth into her vagina, would you not?

A. No, I would just kiss it.

Q. Kiss her?

A. Yes.

Q. Kiss her where?

A. Private parts.

Q. Are you speaking of her vagina?

A. Yes.

Q. Are you saying you didn't put your tongue into her vagina?

[p. 225] A. I don't remember, ma'am, if I did or not. If they say I did, I will go by what they said.

Q. Did you ejaculate on the children?

A. I don't remember.

Q. Did you place their penis in your mouth or the boy's penis in your mouth?

A. I don't remember that, ma'am.

Q. Did you ejaculate on the little boy?

A. No, ma'am.

Q. Did you fondle the little boy?

A. Yes, ma'am.

Q. And as a consequence, you were charged in 1967 with sodomy and with indecent liberties with a child. Is that correct?

A. Yes, ma'am.

Q. And I'm going to show you State's Exhibit Number Nine. Is this your photograph taken?

A. Yes, ma'am.

Q. In King County?

A. Yes, ma'am.

Q. At the time of your arrest?

A. Yes, ma'am.

Q. For the molestation of the two young children?

A. Yes, ma'am.

Q. You molested those children because you had a sexual [p. 226] urge, did you not?

A. Yes, ma'am.

Q. And you could not control your urges, could you?

A. I don't know. I didn't try.

Q. You didn't try?

A. That's right.

Q. You were in Western State Hospital, and you had taken sexual offender treatment. Is that correct?

A. That's correct.

Q. And you got out, and you sexually offended?

A. Yes, ma'am.

Q. You made a choice?

A. Yes, ma'am.

Q. And you acted on your choice?

A. Yes, ma'am.

Q. And you chose children?

A. Yes, ma'am.

Q. And you chose more than one children – multiples of children, did you not?

A. Yes, ma'am.

Q. This time, instead of sending you for care and treatment, they evaluated you first at Western State Hospital, didn't they?

A. Yes, ma'am.

Q. And you told them you weren't interested in being [p. 227] treated, were you?

A. You have to understand the circumstances on that.

Q. Can you answer my question, sir? You told them you did not wish to be treated?

A. Yes, ma'am.

Q. And as a result, you were resistive to treatment; and they sent you to the Shelton Penitentiary. Is that correct?

A. Yes, ma'am.

Q. And how long did you stay in the Shelton Penitentiary?

A. Oh, less than ninety days. That's like Topeka.

Q. And that's an evaluation center?

A. Yes, ma'am.

Q. And then you went to another penitentiary. Is that correct?

A. Yes, ma'am.

Q. And then did you return there to Walla Walla?

A. No, I went from Shelton to Walla Walla.

Q. Shelton, Walla Walla. But the place that you were incarcerated was Walla Walla Penitentiary in Washington?

A. Yes.

Q. And what type of facility is that?

A. That is a maximum and medium security penitentiary.

Q. It's a maximum or medium facility, to insure that the people don't get out and do their crimes again. Is that correct?

[p. 228] A. Yes, ma'am.

Q. Were there children in that penitentiary?

A. Just behind it.

Q. Did you have any opportunity to molest any children during your stay at Walla Walla?

A. No, no, ma'am.

Q. And you were at Walla Walla until 1972. Is that correct?

A. Yes, ma'am.

Q. So from about 1967 through 1972, your sexual ability was hampered because you were in the penitentiary, wasn't it?

A. Yes, ma'am.

Q. You didn't have any opportunity to molest children?

A. No, ma'am.

Q. I'm going to show you Petitioner's Exhibit Number Four; and this is the official documents from King County Superior Court in Washington, showing the molestation charges and convictions for the young boy

and young girl, Constance Herzog (sp) and her brother Richard Allen, who was eleven. Do you see those documents?

A. Yes, ma'am.

Q. Now, when they send you out on parole, they have a long talk with you, don't they?

A. Not the State of Washington no, ma'am.

Q. They don't? They just let you out the door?

A. Parole board tells you when you're going home the day you [p. 229] come ready to go home. They turn you loose. Do they give you any instructions?

A. Report to a parole officer.

Q. Do they tell you that you are supposed to have some kind of treatment?

A. No, ma'am.

Q. But you were paroled from the State of Washington back to the State of Kansas. Is that correct?

A. Yes, ma'am.

Q. And on an interstate kind of – they changed your parole from one time to another – So we got you here?

A. Yes, ma'am.

Q. And when we got you here, you went to Sedgwick County Mental Health, didn't you?

A. Yes, ma'am.

Q. And you went to Sedgwick County Mental Health because your parole officer wanted you to have

some care and treatment for your sexual deviancy. Is that correct?

A. Yes, ma'am.

Q. Now, you'd been diagnosed as a pedophile, weren't you?

A. Yes, ma'am.

Q. And you know what a pedophile is?

A. Yes, ma'am.

Q. That's a person who has desires sexually for children?

A. Yes, ma'am.

[p. 230] Q. And you were also diagnosed as having other conditions as being a sexual deviant and a sociopathic personality when you were at Western State Hospital. Is that correct?

A. I'm not sure. I'll take your word for that.

Q. Okay. And you his declare yourself to be a pedophile, don't you?

A. Yes, ma'am.

Q. So you acknowledge the fact that your sexual interest is it directed towards children?

A. Yes, ma'am.

Q. When you came to Sedgwick County Mental Health, your purpose was to work with the sexual offender treatment program to monitor your abnormal behavior. Isn't that correct?

A. That's correct.

Q. And you were seen by doctors there and his group therapist there, were you not?

A. No, ma'am. I was only seen by one person.

Q. And that would be Mr. Waite (sp). Is that correct?

A. I believe that's his name.

Q. And Mr. Waite (sp) is now deceased, I might tell you. But his records are still here. And, as I understand, you would go to these group sessions; and you would sit around in the group sessions; and you would discuss how you felt. Is that correct?

[p. 231] A. No, ma'am. Not with Dr. Waite (sp). It was a one-on-one meeting with Dr. Waite.

Q. And in your discussions with Mr. Waite (sp), you would go on a regular basis, would you not?

A. Yes, ma'am.

Q. And do you recall in January of 1973 discussing with him the strong feelings of dislike you had for your mother?

A. I don't recall any conversations I had with the man, no.

Q. Do you recall telling him that she tried to raise you as a female child?

A. I have. That's – I told that story so many times, it was possible I did, yes.

Q. And you told him that she said you wanted to or needed to wear a bra; that she needed a girl and was determined to make you into one. And you had a lot of resentment for that reason?

A. Yes, ma'am.

Q. At this time you were living with a woman, were you not?

A. Yes, ma'am.

Q. And this woman's name was Elizabeth?

A. Yes, ma'am.

Q. And Elizabeth had been your former wife?

A. Yes, ma'am.

Q. So you and Elizabeth had been married?

A. Yes.

[p. 232] Q. You and Elizabeth had been divorced?

A. Yes, ma'am.

Q. Elizabeth married someone else?

A. Yes, ma'am.

Q. And you came back into her life?

A. Correct.

Q. And Elizabeth had some children, and those were – What are their names?

A. Roger, Ray, Rose and Robert.

Q. And two of them are in the courtroom today, are they not?

A. Yes, ma'am.

Q. And that would be the people sitting or at least one of the two – Rose is sitting here. And Roger has been in the courtroom. Have you seen them in here?

A. Yes, ma'am.

Q. And those are two of your four stepchildren?

A. Yes, ma'am.

Q. But you also had the two natural boys that you did not raise?

A. That's right.

Q. Now, at the time that you moved in in January of 1973, after you had been released from the penitentiary out at Walla Walla, you still had sexual urges towards children, did you not?

A. Not real strong at that point, no.

[p. 233] Q. It was the winter, wasn't it?

A. Yeah, it was.

Q. And your sexual urges changed from season to season?

A. No, ma'am.

Q. You did tell them at Sedgwick County Mental Health that you didn't have any problems with your stepdaughter?

A. No, ma'am. At that point I did not.

Q. And that you told them that when you got the feeling you tried to change your thoughts and to do some

activities that might distract you from wanting to molest children?

A. Yes, ma'am, I did that.

Q. And that you thought that when you were tired or stressed and in the summertime the urges would hit you the strongest?

A. I don't recall that, ma'am; but it's possible.

Q. You continued to have visits; and you continued to talk about your sexual urges, did you not?

A. Yes, ma'am.

Q. And you continued to tell them that you controlled your feelings; but you were concerned about the summer?

A. Yes, ma'am.

Q. And you told them at least in February that you were starting to get uptight because you were concerned about the children being out playing; and summertime was coming. Is that correct?

A. I don't recall that, no.

[p. 234] Q. Were you molesting children during this period of time?

A. I don't believe so, ma'am.

Q. Were you molesting your stepdaughter at this period of time?

A. I don't believe it had started at that point, no.

Q. Were you molesting your stepson, Roger, at this time?

A. I don't believe it started at that point, no, ma'am.

Q. So you believe you were controlling your urges?

A. I thought I was.

Q. You continued to go through Sedgwick County Mental Health and to meet and in March of 1973, you told them that you didn't know how you would do because the summer was coming. Is that correct?

A. Yes, ma'am.

Q. And you knew that there would be a lot of children out in the summer?

A. Yes, ma'am.

Q. And the children would be accessible to you?

A. Yes, ma'am.

Q. And your sexual urges were very strong, and you knew that you had the propensity to molest?

A. Yes, ma'am.

Q. And you knew that you couldn't control it?

A. Yes, ma'am.

Q. And you continued to go, and in April again you talked [p. 235] about your problems with the doctors there at Sedgwick County Mental Health. Is that right?

A. Yes, ma'am.

Q. And you missed an appointment here and there, didn't you?

A. Yes.

Q. And then in April, the end of April, you told them you thought everything was gonna be okay; and you didn't think you had any urges?

A. Yes, ma'am.

Q. And again in May you reported to them you didn't think you would have any – any urges?

A. I run out of money. I couldn't afford them.

Q. I'm sorry?

A. I run out of money. I couldn't afford to go any more.

Q. Sedgwick County Mental Health is on a sliding sale [sic]?

A. Yes, ma'am, but I had to take a taxi. I couldn't afford the taxi any more.

Q. Because you couldn't take a taxi, you couldn't go to any more sexual treatment. It's coming to the summertime in June; and you stopped going, didn't you?

A. Yes, ma'am.

Q. So you had told them earlier that you got the urges in the summertime; and it was now the summertime. And you quit going to therapy, didn't you?

A. Yes, ma'am.

[p. 236] Q. Is that when you started molesting Rose?

A. Somewhere in that period.

Q. So the urge got to you?

A. Yes, ma'am.

Q. She was accessible?

A. Yes, ma'am.

Q. She was a child?

A. Yes, ma'am.

Q. And you molested her?

A. Yes.

Q. She was your own stepdaughter?

A. Correct.

Q. Did you think that was a problem?

A. It's a problem.

Q. Did you think it was then?

A. Yes.

Q. But you sought no treatment?

A. No, ma'am.

Q. And you continued to molest her?

A. Yes, ma'am.

Q. And you tended to hold it over her head and give her permission to do things if she would satisfy your –

A. I don't recall that.

Q. – sexual desires?

A. I don't recall that, no.

[p. 237] Q. And you started to molest your stepson, did you not?

A. Yes.

Q. And your stepson had cerebral palsy, didn't he?

A. Yes, ma'am.

Q. And during this time your daughter or your granddaughter was placed in your home by social and rehabilitative services, wasn't she?

A. Yes, ma'am.

Q. And that was an infant girl?

A. Yes, ma'am.

Q. Did you molest her?

A. No, ma'am, I did not.

Q. Did you have sex with your wife during this time?

A. I believe I did, yes.

Q. Did you have some problem with the sexuality of your wife?

A. Yes, ma'am.

Q. Did you think she was overweight?

A. Yes, ma'am.

Q. Did you think she nagged you too much?

A. Yes, ma'am.

Q. And that turned you off?

A. Yes, ma'am.

Q. To her?

A. Yes, ma'am.

[p. 238] Q. So you molested your daughter?

A. Yes, ma'am.

Q. She wasn't overweight?

A. No, ma'am.

Q. And she didn't nag you?

A. No.

Q. You're still a pedophile at this time, weren't you?

A. Yes, ma'am.

Q. Now, you did get caught during this period, didn't you?

A. Yes, ma'am.

Q. And it was 1978 when they blew the whistle on you and said they thought you were molesting your son?

A. Yes, ma'am.

Q. And social and rehabilitative services broke in and made you go back to Sedgwick County Mental Health, didn't they?

A. Yes, ma'am.

Q. And they wanted you to be seen because they were concerned that you were molesting your stepson?

A. Yes, ma'am.

Q. And you were molesting him?

A. Yes, ma'am.

Q. And you were placing your mouth on his penis?

A. I don't remember that, ma'am.

Q. You were touching his genitals?

A. Yes, ma'am.

[p. 239] Q. Were you causing him to give you oral sex?

A. I tried.

Q. And were you having oral sex with your daughter, Rose?

A. Yes, ma'am.

Q. And were you having intercourse?

A. I don't remember.

Q. Were you ejaculating on her?

A. No.

Q. This all that was happening in the basement of the home where you and the two children were located?

A. Yes, ma'am.

Q. And you did not share a room with your wife, did you?

A. I did up until I went working third shift.

Q. And so then the kids were more accessible to you downstairs, weren't they?

A. Yes, ma'am.

Q. Okay. So you had them right there when you needed them, didn't you?

A. You could say that.

Q. And so you went to Sedgwick County Mental Health, and you complained about your sex life and said you had trouble ejaculating?

A. Yes, ma'am.

Q. But you didn't have any trouble with the children, did you?

[p. 240] A. Yes, ma'am, I did.

Q. Now, after this episode, there was no arrest, was there?

A. No, ma'am.

Q. There was no conviction, was there?

A. No, ma'am.

Q. And Rose never told anyone that you were molesting her, did she?

A. I think she told her mother.

Q. And her mother protected you, didn't she?

A. Yes, ma'am.

Q. And she didn't tell you to stop doing that, did she?

A. She tried to stop me.

Q. Didn't do a very good job, did she?

A. Yes, she did.

Q. So you stopped molesting Rose?

A. For a while there, yes, ma'am.

Q. But did the urge get you again?

A. Yes, ma'am.

Q. Did you have trouble controlling it?

A. Yes, ma'am.

Q. Did you molest her again?

A. I don't remember. It's been many years.

Q. Many children ago.

A. No, many years.

Q. You found a couple more kids in 1984, while you were [p. 241] working at an electronics shop, didn't you?

A. Yes, ma'am.

Q. And there were two young boys that were thirteen years of age that you molested in Wichita back in 1984?

A. I tried to. I did not get it accomplished.

Q. You fondled those boys in their genital area?

A. I tried to fondle them.

Q. Were you looking to get the job done?

A. I tried.

Q. And what stopped it?

A. They did.

Q. So it wasn't that you stopped yourself. They stopped it?

A. Yes.

Q. Had they not stopped it, you would have gone forward?

A. I was interested, yes.

Q. You had the urge for them, did you not?

A. Yes, ma'am.

Q. And at this time you weren't exclusively interested in little girls, were you?

A. No, ma'am.

Q. You were interested in boy or girl?

A. Yes, ma'am.

Q. Did you believe it was okay?

A. No, ma'am, I knew it was wrong.

Q. But you told the authorities you didn't think there was [p. 242] anything wrong with it?

A. When you get arrested, you tell them a lot of things.

Q. You told Detective Davenport that you had been arrested for this a number of times, didn't you?

A. Yes, ma'am.

Q. And you told Detective Davenport that you just couldn't stop the urges?

A. I don't remember what I told that man.

Q. If he says that, would you dispute it?

A. No.

Q. Well, then you left and you got convicted here in Sedgwick County, didn't you?

A. Yes, ma'am.

Q. I know this is a legal document, but you did have to go to court here in Sedgwick County. You had a lawyer, and you ended up being convicted of indecent liberties with a child. Is that correct?

A. That's right.

Q. And Petitioner's Exhibit Number Six is that court file. You probably haven't seen this.

A. I have seen a lot of stuff in Kansas courts, yes, ma'am.

Q. So this is what you were originally charged with back in 1984 and what you got convicted on. And the bottom line is you went to the penitentiary?

A. Yes, ma'am.

[p. 243] Q. But before you went to the penitentiary, they sent you again to the Kansas Department of Corrections to have an evaluation, didn't they?

A. Topeka, yes, ma'am.

Q. Topeka. And that's called the State Reception and Diagnostic Center. It was then, wasn't it?

A. Right.

Q. And during that time, you talked to a number of people, didn't you?

A. I can't remember who I talked to.

Q. More than one person.

A. Yes.

Q. They poke you, prod you, check your heart, liver, lungs they check you all over; and they check your mind, don't they?

A. Right.

Q. And you had talked to these people, and you took some tests?

A. Right.

Q. They make you take these psychiatric or psychological tests. Fill in the blanks. They ask you questions?

A. Yes, ma'am.

Q. And you tried to be as truthful as possible to them?

A. I don't think so. I don't believe anybody is truthful.

Q. Excuse me?

[p. 244] A. I don't think anybody was truthful on those tests.

Q. So you don't think you were truthful on those tests?

A. No.

Q. You're saying you lied to them? You're telling the truth?

A. Yes, ma'am.

Q. You're telling the truth to us here in court?

A. I have to.

Q. They said that you disclosed your sexually abhorrent behavior and told them that it happened when you were very young?

A. I don't remember talking to anyone up there. I remember talking to people, but I don't remember what I said to anybody.

Q. Do you remember telling them you tried to be discrete choosing children you didn't know and where you would not be seen?

A. That sounds like something I could have said.

Q. The truth of the matter was you tried to be discrete. You weren't going to do it in front of their parents. You took them away from their home.

A. No.

Q. And you weren't going to do it in front of witnesses?

A. True.

Q. You were not going to do it an open park, sex with these [p. 245] kids. You were going do it in a car.

A. Right.

Q. You tried to be discrete?

A. Yes.

Q. You also told them that you could act on these impulses once to twice a month. Do you remember telling them that?

A. No, ma'am, I don't remember that.

Q. But if the records reflect that, you won't dispute that?

A. I won't dispute that that's what the record shows.

Q. I want to do some mathematices [sic] here. You said in the SRDC report that once to twice a month that you would engage in these sexual activities. Do you remember? Do you recall my question?

A. I recall – What question is that?

Q. Let me rephrase it for you. You spent since 1956 out of the last thirty-eight years – about half of that or nineteen years in prison or in psychiatric institutions, have you not?

A. Yes, ma'am.

Q. All right. And you told them that when you were out 'cause we know there weren't any children accessible to you the times that you were in the penitentiary. Is that right?

A. That's right.

Q. So you didn't have relationships with children during those approximately nineteen years?

A. That's true.

[p. 246] Q. But you did have nineteen years on the loose, didn't you?

A. Yes, ma'am.

Q. And during that time, you were non-exclusively picking on little boys and little girls and choosing them for your sexual enjoyment?

A. Not all the time, no, ma'am.

Q. Was it for their sexual enjoyment?

A. No, I didn't do it all the time. There was times when nothing would happen.

Q. Times that you couldn't find anybody?

A. No, times when I had no urges to do so.

Q. Not very often?

A. Oh, quite a few times, ma'am.

Q. Did you have the same kind of sexual urges for your wife?

A. No. No, ma'am, but in Seatle [sic] I did have a girlfriend.

Q. She have kids?

A. No.

Q. You gave some reasons to the State Reception and Diagnostic Center for why you did this. You felt that you were stressed out, and that's why you molested kids. Is that right?

A. Yes, ma'am.

Q. So when you do get stressed, then, you feel the urge comes on; and you want to molest a child to relieve the stress?

[p. 247] A. No, ma'am. I can't control the urge when I get stressed out.

Q. And you get stressed out under many different circumstances, don't you?

A. Not a whole lot, no, ma'am.

Q. Are you stressed out today?

A. A little bit.

Q. Have you got the urge today?

A. No.

THE COURT: Mrs. Foulston, I believe this is the opportune time to take a short recess.

MS. FOULSTON: Certainly, Your Honor.

THE COURT: Ladies and gentlemen of the jury, Ms. Soper should be here shortly; and I'm going to have her escort you to your jury room. We will take a recess and try to reconvene in about fifteen minutes.

(Pursuant to the recess, proceedings continue as follows outside the presence of the jury.)

THE COURT: We're now all assembled outside the presence of the jury. Party want to put any matter on the record before we bring the jury back in?

MS. BARNETT: No, Your Honor.

THE COURT: Very well.

MR. WEILERT: No, Your Honor.

[p. 248] THE COURT: Well, I will ask Ms. Soper to bring the jury back in, please.

(The jury returns to the courtroom.)

THE COURT: Good morning ladies and gentlemen. Mrs. Foulston.

MS. FOULSTON: Thank you, Your Honor.

CONTINUED DIRECT EXAMINATION

Q. For the record, you are the same Leroy Hendricks that testified prior to the break?

A. Yes, ma'am.

Q. And you understand you're under the same oath, sir?

A. Yes, ma'am.

Q. Mr. Hendricks, we had talked a little bit about the fact that you had been paroled to the State of Kansas from the State of Washington; and I'm going to show you State's Exhibit Number Five, petitioners exhibit; and these are some additional documents regarding your order of parole and conditional release. Do you see that?

A. Yes, ma'am.

Q. Does your signature appear on that document?

A. Yes, ma'am.

Q. All right. So that would suppose that you would have gotten a copy of this. Is that correct?

A. Yes, I used to have a copy of that.

Q. So they told you that you had to consult with the parole [p. 249] officers regularly and that you had to participate in an outpatient program concerning sexual problems under the guidance of the parole authority. Is that right?

A. Yes, ma'am.

Q. And as a consequence, that's when you went to Sedgwick County Mental Health here in Kansas?

A. Yes, ma'am.

Q. And your parole wasn't revoked as a result of your not going to the treatment, was it?

A. No, ma'am.

Q. So nothing happened to you because you didn't go?

A. That's right.

Q. And we had also talked about your conviction in 1963 in the City of Seattle, and is this your photograph from that? Can you see that? Let me bring it up closer for you.

A. No, I can't see that now. I've never seen that photo before.

Q. Can you speak up?

A. Yes, ma'am. I assume that's me. I'm not sure. I couldn't identify myself in that picture.

Q. There's a hearing aid. Does that help you?

A. No, ma'am, it does not. It doesn't look like any pictures I've seen of myself, but it could be me.

THE COURT: Mrs. Foulston, I might advise you that that microphone is not hooked up to the – [p. 250] What was the exhibit number on that last photograph?

MS. FOULSTON: Ten. And then Five was before that, Your Honor.

BY MS. FOULSTON:

Q. Directing your attention to State's Exhibit Number Eleven, do you recognize this photograph?

A. Yes, ma'am.

Q. And this is the photograph that was taken when you were booked into the Sedgwick County Jail after your arrest for the molestation of two young boys here in Wichita in 1984?

A. I believe so.

Q. Okay. Now, back to the fact that you went to the State Reception and Diagnostic Center up in Topeka they wanted to diagnose you or figure out what exactly your problems were. Is that correct?

A. I believe so.

Q. And they did find that you were a pedophile, didn't they?

A. Yes, ma'am.

Q. And that you engaged in sexual deviant behavior, is that correct?

A. Correct.

Q. And as a recommendation, they ended up sending you to the penitentiary, didn't they?

A. Yes, ma'am.

Q. Now, when you were talking with them, in the [p. 251] psychological evaluations, you told them that it was stress that led you to the offenses that you committed. Is that right?

A. I believe so.

Q. And that you also still in court today believe stress has something to do with the fact that you molested the children?

A. Yes, ma'am.

Q. Do you see this as a sexual relief for you from your stress?

A. I don't know.

Q. Do you have insight into your problem?

A. Some.

Q. And you realize that it is a problem that involves other people, do you not?

A. Yes, ma'am.

Q. And you realize that it visits on children grave harm, do you not?

A. Yes, ma'am.

Q. Now, you realize that now, but you in 1985, when you were evaluated at the Reception and Diagnostic Center, indicated that sometimes the children enjoyed the relationship?

A. Some did, yes, sir – Yes, ma'am.

Q. And you believe that the children liked the sexual activity that you performed on them?

A. One or two have, yes, ma'am.

[p. 252] Q. And do you believe that these children asked for it?

A. No, ma'am, I do not.

Q. All right. Did you believe that some of the children invited your attention?

A. No, ma'am.

Q. And were there some children that you did not engage in intercourse or in sexual behavior with that you approached?

A. Oh, yes.

Q. All right. And some walked or ran away?

A. No, just – I never done anything with them.

Q. Is there any kind of child that appeals to you more than another kind of child?

A. No, ma'am.

Q. So it doesn't matter if they're black or white?

A. No, ma'am.

Q. Blonde or brunette?

A. No, ma'am.

Q. Tall or short?

A. No, ma'am.

Q. Fat or skinny?

A. No, ma'am.

Q. You just like kids?

A. Some, yes.

Q. In your own special way?

A. Yes.

[p. 253] Q. You told them in the Reception and Diagnostic Center when they evaluated you that you weren't really motivated to change your behavior?

A. I don't recall saying that.

Q. Was that your feeling?

A. No, ma'am.

Q. But you did go to the penitentiary, didn't you?

A. Yes, ma'am.

Q. And they did ask you to involve yourself in the sexual offender treatment program that was offered?–

A. Yes, ma'am.

Q. And that was free of charge, was it not?

A. Yes, ma'am.

Q. There was no cost to enroll?

A. No, ma'am.

Q. No taxi fair [sic]. You were there?

A. Yes, ma'am.

Q. And they have a program?

A. Yes, ma'am.

Q. And it involves psychologists?

A. I don't know what it involved.

Q. You don't know what it involved, 'cause you didn't go, did you?

A. No, ma'am, I did not.

Q. You didn't go because you didn't feel you needed the [p. 254] treatment, did you?

A. No, ma'am. That was not the reason.

Q. You didn't go because you get paid when you work in the penitentiary. Is that correct?

A. Yes, ma'am, you do.

Q. And you get paid anywhere between 45 cents a day to a dollar five a day. Is that correct?

A. That's right.

Q. And if you took the sexual offender treatment program, you wouldn't get paid as much. Is that right?

A. That's absolutely correct.

Q. So you made a choice?

A. I made a choice.

Q. And your choice was money over treatment?

A. No, ma'am. Joan Hamilton (sp), the parole board lady, made my choice for me.

Q. I can't hear you with your finger over your mouth.

A. I said Joan Hamilton on the parole board made my choice for me.

Q. You chose to earn more money than you did to take treatment. Is that correct?

A. Yes, ma'am.

Q. And so for the ten years you spent within the penal institution, you did not have one day of treatment for your sexual deviancy, did you?

[p. 255] A. Correct.

Q. Did you continue to have thoughts about children during the time you were in the penitentiary?

A. No, ma'am.

Q. So it just went off?

A. You don't think things like that in there. That's dangerous.

A. [sic] You had a normal stay in the penitentiary?

A. I would say normal, yes.

Q. Adjusted well to the penitentiary life?

A. Yes, ma'am.

Q. Presented really no problems?

A. No problems.

Q. No children in the penitentiary?

A. No problems.

Q. No allegations of molesting any children?

A. No.

Q. No interest in adults of the opposite sex?

A. No, ma'am.

Q. Or same sex?

A. No, ma'am.

Q. The only medical problem you had was the hernia surgery in 1988. Is that correct?

A. That and my asthma and bronchitis.

Q. So but in 1988 you did have a some – some abdominal [p. 256] surgery. Is that correct?

A. Yes.

Q. But other than that, no medical care?

a. No.

Q. You're not cured of being a pedophile today, are you?

A. I don't believe so.

MS. FOULSTON: Thank you. I have no further questions.

THE COURT: Cross examination?

MR. WEILERT: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. WEILERT:

Q. Leroy, let's go back to 1984. That was the time when you were charged with the indecent liberties most recent case. Do you remember that?

A. Yes, ma'am. Yes, sir.

Q. And at that time you were looking at a lot of time in prison, were you not, sir?

A. Yes, ma'am. Yes, sir.

Q. I think the maximum penalty that you could have had at that time was forty-five years to a hundred and eighty years?

A. Something like that, yes.

Q. And you made a plea agreement with the State that they would recommend a five-to-twenty-year controlling sentence, wouldn't they?

[p. 257] MS. FOULSTON: Objection as to relevancy, Your Honor.

THE COURT: Sustained.

BY MR. WEILERT:

Q. You went ahead and entered a plea to the two counts, didn't you?

A. Yes.

Q. And you were sentenced to five to twenty years?

A. Yes.

Q. Now, that was back in early 1985, wasn't it?

A. Yes, ma'am.

Q. But you had actually been in custody since, I believe it was September 11th of 1984?

A. Yes.

Q. On September the 11th of 1984, you reached what's called a conditional release date, didn't you?

A. Yes, I did.

Q. And that's the time when you have earned all of the possible good time, you are released on parole?

A. Yes.

Q. Now, you had a condition of your conditional release to go to an outpatient treatment program, didn't you?

A. Yes.

Q. And you were going to be living at a halfway house here in town?

[p. 258] A. Yes.

Q. In any of the sexual activities with children that you have related to us here today, did you use any type of physical force?

A. No, sir.

Q. Did you ever have any kind of weapon?

A. No, sir.

Q. Or make any kind of threat with a weapon?

A. No, sir.

Q. Would it be correct, sir, that you understand that those activities at the – were at your initiation?

A. Yes, sir.

Q. And that you're the one responsible for those activities happening?

A. Yes, ma'am. Yes, sir.

Q. When you said that to you stress is one of the things that makes it difficult for you to control your urges, you understand that that is a problem, don't you?

A. Yes, I do.

Q. And do you have any ideas on how to control your stress besides this acting out with children?

A. Get away from people.

Q. Okay. And have you thought about staying involved with other activities that keep you busy?

A. I have tried that.

[p. 259] Q. During the activities you related, it's correct, is it not, that you were not under the influence of any alcohol or drugs, were you?

A. No, sir, I don't use either one.

Q. Pardon me?

A. I don't use either one.

Q. You didn't engage in any, oh, real bizarre activity, like, you know; bondage or beating or anything like that, did you?

A. No, sir.

Q. You didn't have any particular rituals that you went through as far as finding a victim and then setting and then setting a particular pattern of behavior, did you?

A. No, sir. No.

Q. You said some was at a carnival. Sometimes in a car. The last one was at an electronics store, wasn't it?

A. Yes.

Q. And you were working there?

A. I was.

Q. Now, the difficulties Ms. Foulston indicated that you had with the mother about her treating you like a girl, wanting you to wear a bra, do you think that has anything to do with your activities?

A. It possibly could have, yes.

Q. Do you know for sure?

[p. 260] A. I don't know for sure, no.

Q. If it does, do you feel that's an excuse for your activities?

A. No.

Q. At the time you were last not incarcerated, back in 1984, you were working, weren't you?

A. Yes, I was.

Q. And you were contributing to the support of your wife and your stepchildren?

A. Yes.

Q. And for a while in a way you were – Strike that. You were also engaging in some other activities, I think, in some model building, some other hobbies of that nature?

A. Yes, sir, I was.

Q. Other than the sexual problems with children and your wife, do you feel that the other areas of your adult life were lived – were pretty much in order so far as what society expected of you?

A. Yes, sir, I do.

Q. The Dodge House – That's where you were going to go, wasn't it?

A. Yes, I was.

Q. And that's a halfway house kind of deal, isn't it?

A. Yes.

Q. And it's an environment where you can talk with [p. 261] counselors if you need to?

A. I believe so, yes.

Q. And you can go out and work have a job so that you can pay your own way there?

A. Yes, sir, there is.

Q. And they pretty much make sure that you do the other things you are supposed to do while you're on parole, don't they?

A. Yes, they do.

Q. And if you don't do that, they don't have any hesitancy at all about turning you in, do they?

A. No, they don't.

Q. Do you currently have an urge to have sexual relationships with a child?

A. No, I do not.

Q. When was the last time you feel that you did have such a feeling?

A. Oh, probably in 1984, '85, so –

Q. So during the time of your incarceration, you have not had that?

A. No, I have not.

Q. In all the time between 1956 and 1984, over that, what, twelve-year period, you were either in prison or a hospital for about ten years of that time?

A. I believe that's correct.

[p. 262] Q. Have you got any idea what would happen to you if you got out and engaged in the same type of activity again?

A. I would do the rest of my life in prison.

Q. Do you want to do that?

A. No, I do not.

Q. Why not?

A. I'm sixty years old. I've got very few years left. Bad and good health – Not bad health but not good health either. And I would like to spend some time with my mother before she dies. She's eighty-three, and I sure don't want to hurt anybody.

Q. Do you think you've hurt people in the past with your activities?

A. I believe I have, yes.

Q. Pardon me?

A. I believe so, yes, not physically but mentally.

MR. WEILERT: I don't have any other questions. Thank you, sir.

REDIRECT EXAMINATION

BY MS. FOULSTON:

Q. You haven't physically hurt anyone? Is that what you say?

A. Physically, no.

Q. Mr. Hendricks, directing your attention back to those years when you were living with Elizabeth Hendricks in the [p. 263] company of her four stepchildren, you were building model airplanes during that time, weren't you?

A. I was.

Q. And you were involved with – with the civil air patrol, weren't you?

A. I was.

Q. You were engaging in those hobbies and model building and the things that you talked about that are your stress busters?

A. That's correct.

Q. You were molesting Rose, and you were molesting Roger at the same time, weren't you?

A. I don't know if it was in the same time. There was times I didn't have money to buy models.

Q. You will molest your kids instead to bust the stress if you don't have money to buy model planes. Is that what it is?

A. I believe that's what it is, yes.

Q. You said your parole plan or what you wanted to do was go to the Dodge House. Is that correct?

A. That's right.

Q. And that's here in the City of Wichita?

A. Yes.

Q. And there are 400,000 plus people in the City of Wichita?

A. I don't know what the population is here.

[p. 264] Q. And there's a large population of children in this community, aren't they?

A. Yes.

Q. And you're asking us to believe that you are not going to molest children again, aren't you?

A. I hope I don't.

Q. Are you going to guarantee that you are not?

A. The only way to guarantee that is to die.

Q. And you've never walked in off the street at any time to seek mental health and counseling, have you?

A. No.

Q. On your own?

A. No.

Q. The only time you've ever been in counseling or in an institution is when you got caught. Isn't that right?

A. Yes, ma'am.

Q. In fact, you told Dr. Befort that treatment was bullshit, didn't you?

A. Yes, sir, yes, ma'am, I did.

Q. You wouldn't say you're motivated to change, then, are you?

A. Yes, I am.

Q. Are you planning on dying soon?

A. I don't have many years left.

Q. You have enough years left to molest more children?

[p. 265] A. I don't know.

MS. FOULSTON: Nothing further.

THE COURT: Anything further, Mr. Weilert?

MR. WEILERT: No, Your Honor.

THE COURT: Sir, you may step down.

State may call its next witness at this time.

MS. FOULSTON: State calls Stella Carter.

STELLA CARTER called as a witness, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MS. FOULSTON:

Q. Please state your name for the jury.

A. Stella Jean Carter.

Q. And, Miss Carter, do you live here in Wichita?

A. Yes, I do.

Q. I would like to ask you to think back to when you were about eleven years old. Did anything happen to you that scared you or made you feel uneasy?

A. Yes.

Q. What happened?

A. When I was eleven, my friend and I, Sandy, was walking home from school, which is at Sowers (sp), which is over there by Joyland. And it was noon time, and we were walking. And we got about the middle of Joyland parking lot. We seen [p. 266] this car pull up to the Jordan brothers that were in front of us, and the Jordan brothers talked to the occupant in the car. And then they took out really fast on their bikes. We didn't know why. Then we seen the car turn around, and it came back to us. And this young man was in it, and he asked us if we knew where some street was. And Sandy and I looked at each other and we said no; and we kinda wandered over to the passenger side of the car. And he was talking to us and all of a sudden he exposed himself to us. And it really shocked us. I mean, that was the first time I had ever seen a man. And I think that was the first time for Sandy. And we just kinda looked at it each each [sic] other. And he was stroking himself. And he said, "Do you know what this is?" We just kind of looked at each other and shook our heads. He said, "Would you like to get in and play with it?" And we said no. And he took out – Then we ran all the way to my house, which is over on Sunnybroook [sic]. And my mom was cutting the yard. And we couldn't breathe because we ran so fast, and it really scared us. That was a traumatic experience, and we couldn't talk and –

Q. All right. Let me just ask you to back up, if I could, a little bit if I could. Do you know what year this happened in?

A. I was eleven, '55, '55.

Q. Do you recall how old Sandy was at the time?

[p. 267] A. She was the same age I was.

Q. Were there any adults other than this other person that exposed himself to you nearby?

A. No.

Q. Would you have described this person as an adult?

A. Oh, yeah, yeah, he was an adult.

Q. Do you remember anything in particular about the car?

A. It was a bigger car.

MR. WELERT [sic]: Excuse me, Your Honor. If this is to try to prove the identity of Mr. Hendricks, we'll stipulate that that was him.

THE COURT: Will you accept that stipulation?

MS. FOULSTON: Yes, Your Honor. We will accept that stipulation.

MR. WEILERT: Very well.

BY MS. FOULSTON:

Q. Do you know if anyone was ever convicted because of what had happened to you and Sandy?

A. No, I really don't know if there was or not. I know that we went to the police lineup, and we picked the individual out. But I really don't know what happened to him. At that time I didn't know what happened to him.

MS. FOULSTON: All right. Thank you. May I have just a moment please, Your Honor.

We have no other questions at this time, Your Honor.

[p. 268] THE COURT: Any cross?

MR. WELERT [sic]: No questions.

THE COURT: Very well. You may step down, ma'am. State may call its next witness.

May this witness be released?

MR. WEILERT: Yes, she may.

MS. FOULSTON: Yes.

The State calls Rose Loux to the stand.

ROSE LOUX recalled as a witness, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MS. FOULSTON:

Q. Please state your name for the jury.

A. Rose Loux.

Q. And I don't want to embarrass you, ma'am; but how old are you?

A. Thirty-one.

Q. I'd like to direct your attention to the man seated over at the other table, the farthest end, wearing the light blue shirt, short sleeves, wearing glasses. Do you recognize that person?

A. Yes, I do.

Q. Who do you recognize him to be?

A. Leroy Hendricks, my stepfather.

[p. 269] Q. How long has he been your stepfather?

A. Since I was about nine.

Q. Now, I'm going to refer to him as the respondent from now on, just so you know who I'm talking about. Did you ever live in the same residence with the respondent?

A. Yes.

Q. And from what age?

A. From about nine to eighteen.

Q. Do you recall where you lived at early on, nine to ten years old?

A. Yeah.

Q. Where?

A. 3427 All Hollows.

Q. That here in Wichita?

A. Uh-huh.

Q. And when the respondent first came to live with you, was there anyone else in your family or your home?

A. My three brothers and my mother.

Q. What was your brothers' names?

A. Ray, Roger and Robert.

Q. And what was the [sic] your mother's name?

A. Elizabeth.

Q. Does your mother still live?

A. Yes.

Q. And do you have [sic] happen to know if she is still married to [p. 270] the respondent?

A. Yes, she is.

Q. Now, you indicated that you had lived with the respondent from the time you were nine to eighteen, is that correct?

A. Yes.

Q. During that time, did anything ever occur between you and the respondent of a sexual nature?

A. Yes.

Q. When did that begin?

A. It started shortly after he came to – I'd say about six months after he came came [sic] till I was fourteen.

Q. And what type of activity was it that started shortly after he came?

A. The first time I can remember it was the – I guess oral sex. I mean, he did it – to put his – He didn't put his tongue in me or anything; but he wanted to kiss it, 'cause he thought he had improperly punished me with a belt.

Q. And you're indicating that the respondent performed oral sex on you?

A. Yes.

Q. And you say that he thought he had improperly punished you?

A. He thought that the belt had hit me in the wrong spot, yeah.

Q. So what happened?

[p. 271] A. He wanted to make sure that it hadn't; and he took off my underwear; and then he wanted to kiss me.

Q. All right. In your genital region?

A. Yes.

Q. Now, how often – Strike that. Did it ever occur again after that?

A. Yes.

Q. Do you have any idea of how many times or how often it occurred?

A. Lots.

Q. Can you –

A. Probably three, four times a month. I'm not sure. Sometimes was more than others. And one period of time it did stop, and then it started again.

Q. Would it be exclusively oral sex on you?

A. Yeah.

Q. Okay. Did you ever have to do anything to the respondent?

A. No.

Q. Himself. Would he ever touch you in any other area other than your genital region?

A. No.

Q. Where would this activity take place at?

A. In the basement of our house or in the car. I don't remember any other places.

[p. 272] Q. And how old where [sic] you when this stopped?

A. I was fourteen.

Q. Now, you indicated there was a period during which it stopped?

A. Uh-huh.

Q. Do you recall what age you were at that point?

A. I was around twelve, eleven or twelve.

Q. And for what length of time did this activity stop?

A. I can't say for exactly how long. Maybe a year if that much.

Q. Do you know why it stopped?

A. No.

Q. Did you ever tell anybody while this was taking place about what was happening?

A. I told my mother one time.

Q. What was her reaction?

A. She made me sit on his lap while he apologized to me.

Q. Did she take any other precautions that you know of to try to prevent this from happening?

A. She moved my room upstairs next to hers.

Q. Where had your room been?

A. In the basement beside Leroy's.

Q. The respondent's bedroom was downstairs?

A. Did the respondent and your mother share a bedroom?

A. At first for a little while but most of the time, no.

[p. 273] Q. And when you say the time that they didn't share a bedroom, where was his bedroom located at then?

A. Downstairs, beside mine.

Q. Was your mother's bedroom ever downstairs?

A. No, it was always upstairs.

Q. Now, the downstairs area we're talking about, was that like on a first level; or where was that at?

A. It's a bi-level house, so it's like half underground.

Q. Did your mother ever go down to this lower area?

A. Hardly ever.

Q. Now, when the sexual activity wih [sic] the respondent finally ended for good, I believe you said you were fourteen. Is that correct?

A. Uh-huh.

Q. Do you know what made it stop then?

A. I did.

Q. How would you make it stop?

A. I told him if he ever touched me again I would kill him.

Q. And did he ever try to approach you again after that?

Q. You indicated that you lived in the same home then until you were eighteen. Is that correct?

A. Yes.

Q. Now, you mentioned that you have a brother named Roger. Is that correct?

A. Uh-huh.

[p. 274] Q. And how much younger is Roger than you?

A. He's about seven years younger.

Q. Okay. And did you ever see anything happen with Roger?

A. I never seen anything, no.

Q. Was there ever any time that you felt suspicious or –

A. Yes.

Q. – kind of questioned things? And what was it made – made you feel suspicious?

A. Some of the same things. You catch them alone and things would just be kinda stiff and tense; and he was doing things like taking Roger for rides with him a lot, like he used to do me.

Q. Now, you mentioned rides. Did your family have a car?

A. Yes.

Q. And did they have a car the entire time you lived at home?

A. I can't be 100 percent sure; but most of the time, I remember having a car.

Q. All right.

A. I think there was a little while that he took the bus places.

MR. WEILERT: No questions.

MS. BARNETT: Your Honor, at this time I would – And I beg the Court's pardon. I would ask to recall Rose Loux again.

[p. 275] THE COURT: All right. You may recall her if the respondent has no objection. Is that correct?

ROSE LOUX recalled as a witness, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MS. BARNETT:

Q. I'm very sorry, ma'am. You are the same Rose Loux that just testified?

A. Yes.

Q. You understand that you're still under an oath to tell the truth?

A. Yes.

Q. Let me just ask you when the sexual activity took place between you and the respondent, were there ever any threats made to you?

A. The only time there was was after when I was twelve. It wasn't a physical threat. He didn't have a weapon or anything. I had had my first sexual experience with a boy; and he would threaten me with my mom; and the fear of her was worse than what he would do.

Q. All right. Take a deep breath. Would you like some water?

A. No, I'm fine.

Q. Now, you say he would threaten you with your mom. What [p. 276] do you mean by that?

A. He found out that I had had sex with this boy and he would tell her.

Q. He threatened to tell her if you didn't do what he wanted?

A. Yes.

Q. Did he ever make any other types of threats to you?

A. No.

Q. Were you there promised or given anything for sex?

A. I was. I could learn to drive a car if I could do what he wanted or let him do what he wanted. He would buy me things. I would get to do things liking [sic] skating. He would get it around my mom, get permission to do things.

Q. Was your mom pretty strict at that time in your life?

A. Yes.

Q. Now, let me ask you if you can recall any activities that the respondent was involved in as far as activities involving children. And I don't mean sexual activity. I mean other more normal activities.

A. Just his airplanes and civil air patrol. And there was also just groups of children around him with his airplanes. And the civil air patrol was children.

Q. What kind of airplanes were these?

A. Oh, everything from little gliders to big thousand dollars [sic] jobs. They were big.

[p. 277] Q. These were the type airplanes you would go out in a field, and you would fly – fly and stuff?

A. Uh-huh.

Q. And was it common to see children around the respondent, in your opinion?

A. Yes.

MS. BARNETT: All right. Thank you very much, ma'am. I have no further questions at this time.

THE COURT: Mr. Weilert.

MR. WEILERT: Excuse me, ma'am. Very briefly.

CROSS EXAMINATION

BY MR. WEILERT:

Q. You aren't meaning to imply that there was any kind of sexual activity going on between Leroy and these other children, are you?

A. I can't say that there was. I seen lots of suspicious situations after I was older. I didn't realize that anybody was being hurt besides me.

Q. Okay. But you didn't see anything, did you?

A. No, sir.

Q. And whether you think something is suspicious or not, that's pretty much your opinion, isn't it?

A. Right.

MR. WEILERT: Thank you.

THE COURT: Anything further by the State?

[p. 278] MS. BARNETT: No, Your Honor.

THE COURT: All right, ma'am. You may be excused.

State may call its next witness.

MS. BARNETT: The State calls Roger Morris to the stand.

ROGER MORRIS called as a witness, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MS. BARNETT:

Q. Would you please state your name for the jury.

A. Roger Morris.

Q. And, Mr. Morris, how old are you?

A. Twenty-four.

Q. Did you just see Rose Loux testify?

A. Yes.

Q. And do you know her?

A. That's my sister.

Q. Now, I want to direct your attention to the man seated over at the other table farthest away, wearing the light blue short-sleeve shirt. Do you recognize him?

A. Yes.

Q. Who is that?

A. Leroy Hendricks.

[p. 279] Q. And are you related to Mr. Hendricks?

A. Yes.

Q. How are you related to him?

A. Stepson.

Q. And how old were you, if you recall, when Leroy Hendricks became your stepfather?

A. Three.

Q. All right. And do you have any other brothers or sisters other than Rose?

A. His two.

Q. Who are they?

A. Two brothers.

Q. What are their names?

A. Robert, Ray Morris.

Q. Are they older or younger than you?

A. Older.

Q. How old are you when you have your first memories of the respondent, Leroy Hendricks?

A. When he started sexually [sic] activities?

Q. About how old were you when that happened?

A. About nine, ten.

Q. Okay. And what's your first memory of that type of experience with the respondent?

A. I don't remember any first memories of it.

Q. Okay. Do you remember any sexual activity with the [p. 280] respondent?

A. Not until I – probably about twelve years old.

Q. All right. Thinking about what happened when you were twelve years old, what do you remember about it?

A. Going downstairs into his room or in the utility room, where he worked on his airplane model.

Q. And what happened down in the respondent's room?

A. He would play with me or have – Or he would suck on my penis.

Q. I'm not trying to embarrass you; but when you say he would play with you, where would he touch you at?

A. On my penis.

Q. Do you recall how many times this happened or how often it would happen?

A. Probably at least once a week.

Q. Did it ever stop for good?

A. No.

Q. And how old were you when the last sexual experience with the respondent occurred?

A. Fourteen.

Q. All right. And during the time, like, let's say from what you remember when you were twelve to fourteen, were there any other places where this sexual activity would occur with the respondent other than down in his room or the utility room?

[p. 281] A. In the car.

Q. Now, you've outlined for us some fondling that occurred or some oral sex on you that occurred. Was there ever any any [sic] other type of sexual activity that the respondent would perform on you?

A. No.

Q. Did he, the respondent, ever ask you to perform any sexual acts on him?

A. Yes.

Q. What would he ask you to do?

A. Suck on his penis. Play with him.

Q. Did you ever do what he made you do by sucking on his penis or playing with him?

A. Yes.

Q. And where would that type of activity take place at?

A. In his bedroom or upstairs or in the car.—

Q. Now, during the time that you can recall sexual activity taking place, did the respondent ever threaten you?

A. No.

Q. Did he ever make any promises to you or give you anything of benefit for this sexual activity?

A. Yes.

Q. What?

A. Like to buy – like buy me Skoal when I was in seventh grade. Buy me airplane models.

[p. 282] Q. So the respondent would buy you Skoal when you were fourteen years old? Is that what you are saying?

A. Right.

Q. Did that happen more than once?

A. More than once. About three or four times.

Q. Did your mom know about that?

A. No.

Q. Do you recall if there was ever any type of investigation into allegations that the respondent was engaging in sexual activity with you?

A. Excuse me?

Q. I'm sorry. I didn't phrase that very well. Did anybody ever come out and investigate whether or not Leroy was having sex with you?

A. Not that I can remember.

Q. All right. Have you since in talking to Rose learned that there was an investigation?

A. From what they say there was.

Q. All right. Were you ever removed from the home by SRS or the police department?

A. No.

Q. Do you recall a baby ever being placed in your home or coming to live with you?

A. Yes.

Q. And how where [sic] you related to this baby, if you were?

[p. 283] A. She was my half brother's daughter.

Q. What's your half-brother's name?

A. Jim Robbins.

Q. Do you recall how old she was when she came to live with your family?

A. About two.

Q. And was the respondent living in the home? I'm sorry. Was Leroy Hendricks living in your home when she came to live with you?

A. Yes.

Q. How long did she live with you?

A. Clear up to – I was, I think, six. I'm not really sure.

Q. Till she was six or till you were six?

A. She was six.

Q. How much older are you than she is, if you know?

A. About six or seven.

Q. You're six or seven years older than she is?

A. (Nods, indicating affirmative response)

MS. BARNETT: All right. Thank you very much, Mr. Morris. I have no further he [sic] questions at this time.

THE COURT: Any cross?

CROSS EXAMINATION

BY MR. WEILERT:

Q. Mr. Morris, you said that you talked with your sister, [p. 284] Rose, about this investigation that the SRS did? Do you remember that?

A. There was an investigation on it, but I don't really remember a whole lot of it.

Q. But you did talk to your sister about it, didn't you?

A. Yes.

Q. Did your sister tell you that during that investigation she said there wasn't anything going on between she and Leroy?

A. I don't remember.

MR. WEILERT: Okay. That's all. Thank you.

THE COURT: Any further direct?

MS. BARNETT: No, Your Honor.

THE COURT: All right. May this witness be excused?

MS. BARNETT: Yes, Your Honor.

MR. WEILERT: Yes, Your Honor.

THE COURT: All right, sir. You may step down. You're excused.

At this time, ladies and gentlemen, we're going to adjourn for the noon hour. I would like to have you return and be back here by 1:30. And I'm sure you've worked out with Bonnie. With that I will go ahead and ask you to remember your admonitions and ask you – ask Mrs. Soper to escort the jury out of the courtroom so they can eat lunch.

• • •

[p. 287] has started a jury trial, so your facilities have been limited somewhat. Hopefully we can try to accommodate you by taking a little longer recess next time. Told you you would enjoy it back there, though.

At this time I'll call upon the State. Does the State desire to call another witness?

MS. FOULSTON: State will call Ron Davenport.

RON DAVENPORT

called as a witness, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MS. FOULSTON:

Q. Would you please tell us your name.

A. Ron Davenport.

Q. And your occupation, sir?

A. Administrative investigator for the district attorney's office.

Q. Mr. Davenport, how long have you been in that?

A. Five years.

Q. Were you employed in law enforcement prior to that?

A. Yes, I was.

Q. By whom were you employed?

A. City of Wichita.

Q. What was your occupation?

A. A police detective, patrolman and master police officer.

[p. 288] Q. How long were you with the Wichita Police Department?

A. Twenty-two-and-a-half years.

Q. And then did there come a time when you retired from that occupation and changed to the district attorney's office.

A. Yes.

Q. Mr. Davenport, directing your attention back to 1984, were you employed as a detective with the Wichita Police Department during that year?

A. Yes.

Q. Were you assigned to any specific division within the Wichita Police Department detective section?

A. The special investigation section.

Q. And within the special investigation section, were you called upon from time to time to look into crimes alleged to be sexually motivated?

A. Yes.

Q. Did you come in contact with an individual by the name of Leroy Hendricks?

A. Yes.

Q. Do you see him in the courtroom today?

A. Yes.

Q. Would you please identify him for the record.

A. He's setting at the table, taking a drink.

MR. WEILERT: The record should reflect the [p. 289] witness has identified Mr. Leroy Hendricks.

BY MR. WEILERT:

Q. Can you tell the Court and the jury the circumstances surrounding your contact with Leroy Hendricks in 1984?

A. We had two reports made by parents of two young men being sexually molested by an individual at 31st and Seneca in Wichita.

Q. What type of a location was that where these allegations or this activity was alleged to have occurred?

A. It was a business called Gene's Electronics (sp).

Q. And the ages of the young boys that were alleged to have been sexually molested?

A. Thirteen.

Q. Did you in inclusion with your investigative duties learn about the facts surrounding these accusations that had been made? What were you told?

A. That the boys went into this business and were touched on the penis by an individual inside the store who they thought was an employee.

Q. Did you later develop a suspect in that case?

A. Yes.

Q. And was that suspect Mr. Hendricks?

A. Yes, it was.

Q. Did you have an opportunity, then, to meet with Mr. Hendricks in connection with your investigation?

[p. 290] A. Yes.

Q. Did he also meet with other members of the Wichita Police Department in connection with this investigation?

A. Yes.

Q. And would one of those people have been detective Tom Allen (sp)?

A. Yes.

Q. Can you tell us when it was that you visited with Mr. Hendricks in relation to other officers visiting with him as well?

A. The first time I visited with him was the last of July, the 30th of July, and the next time was on the 16th of August.

Q. Of that same year?

A. Yes.

Q. So there were some other activities within the investigation that went on before your second meeting?

A. Yes.

Q. At the time of your meetings with Mr. Hendricks, did you advise him of his constitutional rights under Miranda?

A. Yes, I did.

Q. And did you tell him that he did not have to talk to you if he didn't want to?

A. The form was read out loud by him to me the first time, and the second time he read it to himself. He understood it.

[p. 291] Q. Did he agree to visit with you and talk to you?

A. Yes.

Q. And directing your attention to your latter conversation with him that you had – And the date on that was?

A. August 16th.

Q. And on that date, can you tell us what Mr. Hendricks told you about the activities that had occurred and about his personal history?

A. That he had been convicted in Washington in the sixties; that he had served twenty years and that he had – was off parole; but if he was convicted again that Washington was going to send him back.

Q. Did he discuss with you the fact – Or did he admit to you that he had in fact molested these two

young boys, age thirteen, in Wichita as alleged in the reports the police department had received?

A. Yes, he said he had touched both of their penises.

Q. Did you have any discussion with Mr. Hendricks with regard to the reasons why he did this?

A. He said that it just built up that day. The boys had been in twice. But the day I was interviewing him he said everything was under control.

Q. Did he indicate to you that he had any control over the situation of these urges to molest?

A. Just that he had it under control that day.

[p. 292] Q. All right. And referring to your handwritten notes of that date –

A. Okay.

Q. And you did take some notes on the occasion of your meeting, did you not?

A. Yes.

Q. And on that date, did your notes reveal that this urge, quote, "this built up"?

A. Yes.?

Q. And your notes reveal what following message?

A. Said, "could not stop it that day."

Q. Was he relating to his sexual urge to molest these children?

A. Yes.

Q. And he indicated, though, however, that on the day he visited with you everything was under control?

A. Yes.

MS. FOULSTON: I have nothing further.

MR. WEILERT: No questions.

THE COURT: May this witness be excused?

MS. FOULSTON: By the State.

MR. WEILERT: Yes.

THE COURT: State may call its next witness.

LESTER LEE

DIRECT EXAMINATION

* * *

[p. 314] MS. FOULSTON: I'm not going to inquire those questions that you said he could. I'll end my examination.

THE COURT: I think it would be a benefit for the jury. The term "pedophile" has been used. Somewhat disclosed definition of it I think it might be beneficial to the jury if you would have Mr. Lee go ahead and testify as to what the definition of pedophile is.

MS. FOULSTON: Do you mind if he uses DSM-IV?

THE COURT: I don't mind.

(At this point proceedings continue in the courtroom, in the presence of the jury.)

THE COURT: All right. We're all assembled. Actually we were waiting out there until Mrs. Hamilton could change her paper. That's part of the delay. We were all ready to start again.

Mrs. Foulston, would you please continue your examination.

MS. FOULSTON: Thank you, Your Honor.

CONTINUED DIRECT EXAMINATION

BY MS. FOULSTON:

Q. Mr. Lee, when we last left off before the conference with the Court, we were discussing the nature of pedophilia.

A. Yes.

Q. And are you familiar with the characteristics of an [p. 315] individual who might be considered a pedophile?

A. Yes.

Q. Are you familiar with the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, also called DSM-IV?

A. Yes.

Q. And is this a publication from the American Psychiatric Association?

A. Yes.

Q. And what is this book?

A. That's our diagnostic manual. Every diagnosis that we have is in the manual.

Q. All right. I'm going to turn your attention to Page 528 of the manual under sexual and gender identity disorder and point you specifically to the diagnostic criteria for 302.2 pedophilia and ask if you can look at that block and refresh your recollection.

A. Yes.

Q. We've been using the term "pedophilia" in court, and I would like if you could to go over the characteristics and diagnosis of one who might be considered a pedophile.

A. Okay. Criteria one over a period of six months recurrent, intense sexually-arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children, generally age thirteen years or younger. Second, the fantasies, sexual urges or behavior caused – [p. 316] caused clinical significant distress or impairment in social, occupational or other important areas of functioning. Three, the person is at least sixteen years of age and at least five years older than the child or children in the first criteria.

Q. And those are the general criteria or characteristics for diagnosis of that sexually aborrhent behavior as put forth by the American Psychiatric Association?

A. Yes.

Q. Is that a recognized treatise of that association?

A. Yes.

Q. And in your field, is this one that is recognized as a manual that you would refer to as being an educational or learned treatise?

A. Yes.

MS. FOULSTON: Thank you. I have no further questions.

THE COURT: Cross examination.

MR. WEILERT: I have no questions. Thank you.

THE COURT: All right, sir. You may step down.

May this witness be excused?

MS. FOULSTON: By the State.

THE COURT: Sir, you are excused. Thank you very much.

MARY E. CHAMBERS

* * *

[p. 326] Befort to the stand.

DR. CHARLES BEFORT

called as a witness, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MS. BARNETT:

Q. Please state your name for the jury.

A. Charles Befort, B-E-F-O-R-T.

Q. What is your occupation?

A. I'm a psychologist.

Q. Do you work at any particular location or place?

A. Yes, I work – My full-time job is at Larned State Hospital, and I work one day a week at a community mental health center.

Q. What type of education have you received or obtained in order to be psychologist?

A. I have a Doctorate degree from Oklahoma State University 1967 in psychology.

Q. And have you – Or let me ask you, when did you receive that?

A. In 1967.

Q. I'm sorry? I didn't catch that. Since that time, have you received any other education seminars or training in the area of psychology?

A. Not formal education in terms of classes except for [p. 327] maybe in computers and total quality management, things like that, from a junior college; but I've been licensed since 1971; and we're required to give evidence of continuing education participation every time we renew. And so there have been many, many many hours of workshops, seminars, things of that sort.

Q. Who are you licensed by?

A. The Behavioral Sciences Regulatory Board of Kansas.

Q. Is that the board that governs or regulates psychologists in the state?

A. Yes.

Q. Since the time that you received your Doctorate, and also since you've been licensed, what has your practical experience been as a psychologist?

A. My full-time job has been continuously at Larned State Hospital, both as a staff psychologist and as the head of the psychology department or chief psychologist. I have also worked at the community mental health center I referred to, which is in Greensburg one day a week for approximately twenty-one years.

Q. What do you do there?

A. At the mental health center?

Q. Yes.

A. Primarily, I do psychotherapy and counseling. However, I also do evaluations and consult – And I've done [p. 328] supervision of other psychologists there.

Q. Now, you say that you have performed or given therapy, things of that nature. Have you ever worked with sex offenders at this mental health facility?

A. Yes.

Q. And could you estimate for us how many sex offenders?

A. Oh, for twenty-one years; I'm not sure. In recent years, three cases come to mind, two evaluation cases, and another case where I was asked to try to do intervention. They were trying to establish a diversion program for a particular individual.

Q. Now, in talking about your job at Larned, you said you're a staff psychologist. What did you do there as a staff psychologist?

A. Staff psychologist means that your work is primarily clinical; that is, you are working directly with patients in terms of treatment evaluations, treatment planning, treatment implementation, and working with a clinical team in terms of discharging and placing, that type of thing.

Q. And then you indicated you were also a director there. Would that be like an administrative-type position?

A. Yes. I was the chief psychologist in the mid-seventies for a couple of years, and I am currently the chief psychologist and have been so since 1985.

Q. Does that mean that you oversee other psychologists or [p. 329] other psychological professionals at Larned State Hospital?

A. Yes, I'm in charge of the psychologists in the psychology department.

Q. And at Larned State Hospital, have you had the opportunity to work with sex offenders, either people who are accused of committing sex offenses or people who have actually been accused of committing sex offenses?

A. Yes, I have.

Q. On how many occasions?

A. Larned State Hospital has two campuses administered jointly, one superintendent and one chief psychologist and so forth. But the State Security Hospital is for

mostly men, some women, who have been sent to us because they are in some – some kind of criminal trouble. And we are asked to – ordered, not asked, to evaluate them and in many cases to provide treatment. So a lot of persons there – I've been working with what we refer to as forensic cases – that's criminal cases – since probably the early seventies.

Q. Now, with regard to the evaluations that you have mentioned, what do you specifically mean by that when you evaluate someone?

A. If I can go to the forensic cases first, it means that we are requested by the Court to make a specific evaluation. Example –

MR. WEILERT: Excuse me, Dr. Befort. I don't [p. 330] believe the answer is responsive, Your Honor. Ms. Barnett's question was how many evaluations of sex offenders; and now we're into forensic evaluations, which would include all of the other types of offenses also. And I don't think that's relevant in this regard.

MS. BARNETT: Well, as I recall the question just posed to the witness had to do with what is – by the word "evaluations", what does that mean to this particular individual.

THE COURT: All right. Well, you may go ahead and continue. Please make sure you clear it up.

BY MS. BARNETT:

Q. And let me just state, Dr. Befort, do you perform or have you ever performed evaluations on sex offenders, people who are accused or committed sex crimes?

A. Yes.

Q. With regard to – Let's just stick with those evaluations, how do you evaluate a sex offender?

A. It may not – not start out that way. A person may be sent for a competency evaluation to see if they're able to stand trial. And in the course of the evaluation, we try to do a fairly comprehensive, psychology-psychiatric assessment, and so we do the testing; we do the interviewing. We review the records that we have available. We look at the social history information that we have and put together what we [p. 331] hope is a clinical description of the individual, with all this funneling down to the final question, "Is this man in this case – example – competent to stand trial?" We give diagnoses. We describe any kinds of conditions or situations that might mitigate against or for competent functioning in court and so on. But we are clinicians, and we use our clinical skills and competence because they are sent to a psychiatric facility.

Q. Now, you've indicated that in these evaluations, you may make a diagnosis. Is that correct?

A. That's right, sir.

Q. And would that mean a diagnosis with regard to someone's psychological status or condition?

A. Yes.

Q. How do you make a diagnosis of someone, Doctor?

A. Before – Reference was made to the Diagnostic and Statistical Manual IV. That is our diagnostic Bible, I

guess, at the hospital. We're still using the previous version of that book. It's almost as big and is built the same way. But we essentially take a look at the data that we've collected about the person, especially behavioral data, actions, behaviors, things they've done in the past or have said and so forth and how they behaved, whether normally or abnormally. The manual is set up in such a way that you can actually look at behavioral criteria. He does this or [p. 332] doesn't do this, does this, does this and so forth; and it gives you some guidelines as to how many of these behaviors have to appear before you can legitimately make the diagnosis using that manual. And that's essentially how we come up with the diagnosis or in some cases several diagnoses at once.

Q. Would it be fair to say that for twenty-plus years you've been making diagnoses of individuals?

A. Yes.

MS. BARNETT: Your Honor, at this time the State would offer Dr. Befort as an expert in the area of psychology for the rest of his testimony.

THE COURT: Mr. Weilert?

MR. WEILERT: Your Honor, in the area of general psychology, that may be appropriate. I don't think there's a proper foundation for having Dr. Befort declared an expert in the area of the evaluation of sex offenders.

THE COURT: Well, the best of my information there's no necessity for a sub-field of that particular area that I know of. I'll admit the doctor as an expert.

MS. BARNETT: Thank you, Your Honor.

BY MS. BARNETT:

Q. Let's speak just more about sex offenders. Would you have any estimate of how many sex offenders you have made diagnosis on or evaluated for a diagnosis?

[p. 333] A. I never thought of the actual numbers. I'm sure dozens, probably hundreds.

Q. Would it be fair to say that you have been doing that or engaging in that type of activity since you received your license to practice in the area of psychology or your Doctorate?

A. Yes. More in the last twenty years than the first few years but that's true.

Q. Have you found, in fact, that your contact with sex offenders in evaluating them and diagnosing them has increased in the last several years?

A. I would say the last month, which is true, which is very true. A lot of our patients – We've always had a lot of folks who have been sex offenders in our population on the State Security Hospital. Whether it's increased or not, I don't know. There are many.

Q. So would it be fair to say that as a psychologist at the state hospital you've had regular contact with people who are sex offenders?

A. At State Security Hospital, yes.

Q. All right. Thank you, Doctor. Now, we talked a little bit before with Mr. Lee about pedophilia or what a pedophile is. Are you familiar with that term?

A. Yes.

Q. And what does that term mean to you?

[p. 334] A. Using – Not referring to the DSM-III-R, which makes it easier, it's a person who has demonstrated, usually by behavior, which is the most compelling diagnostic criterion, that he has engaged in sexual behavior that is not acceptable to society at large; and is often illegal. The pedophile is a person whose sexual partners, if you want to call them that, are pre-aged folks; in other words, children generally below the age of thirteen. Can be a little higher, depending upon the maturity and so forth. But, anyway, involving these children in sexual behavior with them of some sort.

Q. Have you ever had the opportunity to diagnose or evaluate someone who you believed to suffer from pedophilia?

A. Yes.

Q. Now, when we're talking about this case in pedophilia, are you familiar with the terms of "personality disorder"?

A. Yes.

Q. Does that term in and of itself have a meaning to you?

A. Professionally it does, yes.

Q. What would that meaning be?

A. Again paraphrasing the manual, a person with a personality disorder is an individual who has a set of characteristics or traits that are enduring; that is, traits or characteristics that tend to result in their behaving in

fairly standard predictable ways through most situations. Now, we all have those things, those traits and [p. 335] characteristics. It becomes a disorder when those traits and characteristics result in the person behaving or thinking, perhaps, or otherwise acting in such a way that it causes them trouble, causes society trouble, is considered abnormal, then it becomes a disorder.

Q. Within your profession or within the psychological arena, what type of thing would constitute a personality disorder?

A. An example, you mean?

Q. Yes. An example that we all might be familiar with.

A. I think most of us would be familiar with antisocial personality.

Q. What would that mean?

A. Generally speaking, we're talking about individuals who have disregard for social expectations, social values, social norms. Their behavior indicates that disrespect or unconcern about staying within acceptable boundaries of behavior. Usually these behaviors include disregard for others' rights. They may exploit other people to those persons' detriment. In the worst cases, of course, they turn to crime, criminal behavior. In noncriminal things, they tend to be untrustworthy. They're egocentric, those types of things.

Q. Within the psychological community, is there a term of art, so to speak, for the phrase "mental abnormality"?

A. I'm sorry? What?

[p. 336] Q. Is there a term or phrase "mental abnormality" that has special meaning to you as a psychologist?

A. Certainly clinicians use that phrase. It's not a diagnosis. It's a kind of a general phrase we use to discuss abnormality or deviance.

Q. With regard to pedophilia, that condition, is it considered within your field a personality disorder?

A. Not necessarily. In fact, in terms of the DSM-III, not. There may be a personality disorder also that includes that, but pedophilia as itself is not considered a personality disorder.

Q. All right. Let me ask you. Does the phrase "congenital or acquired condition" mean anything to you?

A. Yes.

Q. What does that mean to you?

A. "Congenital" to me means that it is based in genetics, hereditary backgrounds, biological types of things.

Q. What about "acquired condition?" What would that mean?

A. "Acquired means that it was picked up along the way, during life's experiences. That could be due to the way one is taught, what one learns, how one is conditioned, what experiences occur to the individual in the course of development.

Q. In your opinion, based on your training and your experience, is pedophilia a congenital or an acquired [p. 337] condition?

A. I don't know. I don't know if anybody knows which it is or both.

Q. Is it possible that it's one or the other?

A. It's possible.

Q. Is it possible that it's both?

A. Yes, in my opinion.

Q. Would pedophilia have to be either congenital – a congenital condition or an acquired condition?

A. I can't think of a third option, so I would say it would have to be one or both.

Q. All right. If I were to ask you, does having the condition of pedophilia effect [sic] the emotional or volitional capacity of an individual, would you have an opinion on that?

A. That, of course, refers to the wording in the law; and I had to interpret that.

Q. What do you interpret that to mean?

A. It means because of the condition, acquired or congenital, the individual feels, emotes in certain ways or behaves in certain ways. So if you have a diagnosis resulting from an acquired or conditional condition, that's only worth something if it tells you what kind of an effect it has. So in this case, to me it means that the condition does effect [sic] the emotional and behavioral – behaviors of the individual.

[p. 338] Q. A person who is diagnosed as having the condition of pedophilia, in your opinion, are they predisposed to commit sexual acts with children?

A. Yes.

Q. Let me ask you if you are familiar with the man seated over at the other table, wearing a short-sleeve shirt that's light blue in color?

A. Yes.

Q. Who do you know that person to be?

A. It's Mr. Leroy Hendricks.

Q. And did you have contact with Mr. Hendricks last week in regard to this case?

A. Yes.

Q. And the contact that you had with him, what type of contact was it?

A. Mr. Hendricks had been sent to Larned State Hospital for an evaluation.

Q. Did you perform that evaluation?

A. And I performed that evaluation.

Q. How did you perform that evaluation?

A. I interviewed Mr. Hendricks on three occasions, one at some length and the other two briefer. I also referred to historical records that were made available to me, and we also did a little bit of testing.

Q. What type of testing did you do?

[p. 339] A. I'm not familiar with any tests about pedophilias, but these are standard personality inventories. One is called the Minnesota Multiphasic Personality Inventory. The other is the Milan (sp) Multi-Axial Clinical Inventory Number Two.

Q. Now, you indicated that you interviewed Mr. Hendricks. Is that correct?

A. Yes.

Q. When you interviewed Mr. Hendricks, did you talk of his background, including his convictions?

A. I have to refer to my notes because I did see several of these at once – not at once.

Q. You did take notes?

A. These led to my report; and I need to refer to that, if I may.

Q. Please refer to them if that will refresh your recollection. Let me ask you, did you make that report near in time to when you actually interviewed Mr. Hendricks?

A. Yes, this report was completed within two or three days after I interviewed him.

Q. And have you tried to make it as reliable and as complete as possible?

A. Yes, I hope I always do that.

Q. And then with regard to the court – to using it today, will it aid you in refreshing your recollection about things?

A. It's not just recollection. It's making sure I don't [p. 340] attribute something to him that may have been another fellow's. So I want to make sure.

Q. When you spoke to Mr. Hendricks, did you talk to him about his prior incarceration here in Kansas?

A. Yes, I did.

Q. And did you have the opportunity to ask him about whether or not he had participated in any sex offender treatment programs in prison?

A. I knew from reviewing historical data, it was reported he had refused or had chosen not to participate in the sex offender treatment program that was offered. And so I asked him that specifically, in other words, that I understood he had refused; and I asked him why.

Q. Did Mr. Hendricks give you an answer to that?

A. Yes, he did.

Q. What did he say?

A. He said that he went before the parole board in the usual time and was told there by a parole board member, quote, "There is no cure for your type", unquote. He said that because of that statement, he felt that he would never be granted parole, and therefore participating in a program of that sort was a waste of his time. Additionally, I don't know how it's set out, but he said to participate in that program would have reduced the amount of money he would earn daily from a dollar and five cents a day to 45 cents a day.

[p. 341] Q. When you were talking to Mr. Hendricks on these occasions, did you have a chance to talk to him

about his sexuality, for example, his classification as maybe being bi-sexual or a pedophile?

A. Yes. Again historical records attributed that statement to him; that is, that he described himself as a bi-sexual or pedophile. He said he didn't think he ever was a bi-sexual. And with regard to being a pedophile, he said his – "Well, I understand if a person has sex with a child, he's a pedophile." So under that, yes.

Q. During your conversations with Mr. Hendricks on these occasions, did you talk to him about the specifics of his convictions, such as the type sexual activity he engaged in with the children?

A. Yes, I did.

Q. And specifically right now I want to refer you to the 1984 conviction. Did you ask him about that type of conviction or that type of sexual activity?

A. Yes, I began with that later – latest conviction. He said that his behavior, his sexual behavior with them, was quote, "I tried to touch them", Unquote. He was quick to add that that was the only offense of that nature or offenses. There was more than one there that he had committed in twenty-two.

Q. He stated that those, the convictions, the two indecent [p. 342] liberties, were the only acts that he committed of that nature in twenty-two years?

A. I can't remember if he also included a third incident that was later dismissed at that same general time. But globally, yes, he wanted to point out that in 1984 was the only time that he had offended in that way in twenty-two years.

Q. Did you ask Mr. Hendricks if he considered himself at the current time to be a pedophile or a pedophile?

A. I'm sure I did.

A. He kind of referred again back to the previous statement about his understanding of a pedophile and said, "Well, the law says I am", then implying that "Since the law says I am, I am."

Q. Did you talk to Mr. Hendricks about whether or not he experienced sexual gratification himself through either erections or ejaculation when he was having sex with these children?

A. He said he sometimes experienced erections. Denied that he ever had ejaculated.

Q. One thing that Mr. Lee had indicated earlier in his testimony was that the DSM-IV indicates one thing that you might look at in the criteria for pedophilia is fantasies of a sexual nature. Did you talk to Mr. Hendricks about whether he had any fantasies involving children?

[p. 343] A. He said he didn't remember having any.

Q. Did you talk to – Strike that. Let me ask you, Doctor, is it your experience in dealing with sex offenders that there are occasions when they engage in behavior that they are not convicted for?

A. Oh, yes.

Q. Did you talk to Mr. Hendricks about that, whether or not there was any other conduct he engaged in with children that was not charged or convicted on?

A. Yes. I asked him directly. That's a very – That's a question often asked – is automatic.

Q. What did Mr. Hendricks say?

A. He said, "Every time I did it, I was caught." If I may go on.

Q. Yes, please.

A. I questioned that and asked him again if that was really the case. And he backed off a little bit and said, "I probably got away with it one or two times. But that was in the 1950's." Again he wanted to mention that he didn't offend at all during the twelve years prior to his conviction in 1984.

Q. Let me just ask you, Doctor, kind of off the path here for just a minute. Did Mr. Hendricks ever indicate to you that he molested his stepdaughter, Rose?

A. No.

[p. 344] Q. Did Mr. Hendricks indicate to you that he had ever molested his stepson, Roger?

A. No.

Q. Thank you very much. Did you ask Mr. Hendricks if he had any certain preferences or if he liked kids in a certain age range or anything like that?

A. I can't remember if I asked him about the age range; but in terms of sex, he began, according to him, mostly with little girls; then later involved both sexes, children in sexual activity with him.

Q. Did he indicate to you how he would engage these children in sexual behavior or what his approach might be towards these children?

A. He conveyed and said that he used a more or less a friendly approach and that if the kids were friendly and cooperative in turn, fine. If they did not respond or in any way indicated that they did not want to participate, then he would not involve them. He would, quote, "take off", unquote.

Q. When you were talking to Mr. Hendricks about this, did you get the impression from what he was saying to you that there had been occasions when he had approached children who had indicated an unwillingness and that he had been – not – that he had then not pursued his advances?

A. Well, he would – "Some would let you and some [p. 345] wouldn't." And he said, "If kids didn't consent, I took off. Why hang around when you are not wanted."

Q. Did you ask the respondent, Mr. Hendricks, if he had ever engaged in sexual intercourse with the children?

A. Yes. And he said he did not.

Q. And what about – Let me ask you if you ever defined sexual intercourse for him such as putting his penis or finger in an oriface, for example, a vagina?

A. I did not ask him that. I felt he knew what sexual intercourse was.

Q. Did you have an opportunity to ask Mr. Hendricks about his first act of molestation towards a child?

A. He reminded me at one point that "That was a long time ago, Doc", and had difficulty remembering. But he then said he thought it was in the fifties, while he was in the military service; and that was a situation of indecent exposure.

Q. Did he tell you if it involved boys or girls or both?

A. At that time, he said it involved girls, little girls.

Q. Did you also talk to him about his conviction in Washington for sodomy and indecent liberties with a child?

A. Yes. We did talk about that. We talked about all the offenses that are – that I had available that were on record. And I think the sodomy conviction –

MR. WEILERT: Your Honor, could we approach

* * *

[p. 350] report to the Court that was sent in, and I'll just direct you to the paragraphs called "Other Information", page 4, at the bottom and then at 5, at the top, is what we're talking about.

THE COURT: Yes, I do have that. I was looking at the original reported date, September 2nd. We don't seem to have a problem then. Can I go ahead and bring the jury back, then?

MR. WEILERT: Yes, sir.

THE COURT: Mrs. Soper.

(At this point the jury returns to the courtroom.)

THE COURT: Ms. Barnett, you may continue your examination.

MS. BARNETT: Thank you, Your Honor.

BY MS. BARNETT:

Q. Dr. Befort, going back to your report, still on page 2, I would just like to ask you before we get back into the specifics of what Mr. Hendricks said to you what other types of documents in general did you have to look at, I believe you mentioned earlier that you looked at some other things?

A. I listed those in the report. You want me to –

Q. Just in general, did you look at police reports in this case?

A. I had police department offense reports for the 1984 [p. 351] incident. I had the State Reception and Diagnostic Center report of April 2 of '85.

Q. And with regard to the State Reception and Diagnostic Center report, did you actually look at it and review it as part of your evaluation process?

A. Yes.

Q. And in looking at that particular report, do you recall if there was any comment in there attributed to Mr. Hendricks about the frequency or regularity of his sexual impulses?

A. Yes.

Q. And did you make any special note of that, or did that seem important to you to consider and everything?

A. Yes. When I was talking to him about offenses or behavioral acts, acts of sex with children for which he was not apprehended, discovered or prosecuted, I just noted that he told the clinician, according to the report in '85, that the KSRDC, that he acted on his sexual impulses, quote, "once per month, twice a month", unquote.

Q. Did you discuss that with Mr. Hendricks when you were talking to him as part of this evaluation?

A. No, I didn't.

Q. All right. Now, I believe we also talked about the – before about your discussing with Mr. Hendricks sexual intercourse. Let me ask you, did you talk to him about engaging in acts of oral sodomy with children and if he had [p. 352] ever done that?

A. Let's see. If he had ever done that? He did say that he tried to have them masturbate him. I don't believe he ever –

Q. If I might –

A. – admitted to –

Q. Go ahead. You don't believe he ever admitted to that?

A. – requiring kids to masturbate him or do oral sex with him.

Q. If I can have you refer on down to the third complete paragraph on page 2 of your report, wouldn't it be fair so [sic] say that he didn't – He didn't have any of the children suck his penis?

A. Okay. Yes, that's right. He specifically denied that.

Q. And, in fact, you talked to him, didn't you, specifically about one of his convictions involving criminal sodomy with the boy, the allegations surrounding oral sodomy and asked him about that?

A. That was, I think, the 1967 case. And he told me that the sodomy conviction resulted from the claim by the boy that he said tried to suck his penis; but Mr. Hendricks denied that that occurred.

Q. In fact, did he tell you the boy wanted to engage in an act of oral sodomy with him?

A. He said the boy wanted him to but that he didn't care to [p. 353] do it.

Q. Thank you. Now, did you ever talk to Mr. Hendricks about whether or not his actions had actually physically harmed any children or harmed any children in any bay [sic]?

A. Yes, I asked him that.

Q. And what did Mr. Hendricks say to you?

A. He said that physically he never harmed a child.

Q. And were you also – Or did you have the opportunity to ask Mr. Hendricks if he knew why he acted out with children or engaged in sexual activity with children?

A. He said initially that he didn't know and that he had tried to get to the bottom of the cause for his behaving in that fashion, even having discussed it with his mother on more than one occasion, and that he had never

found a satisfactory explanation to him as to why he behaved in that manner and had those problems.

Q. In fact, did Mr. Hendricks convey to you that he found sexual activity with children to be a pleasurable experience?

A. Yes, yes, he did.

Q. Now, I believe we talked somewhat about a few of Mr. Hendricks' convictions. Would it be fair to say that you went through all of Mr. Hendricks' convictions with him and discussed the underlying sexual activity with him?

A. Yes. I did have a copy of his – what's called a rap sheet. And he – And he sat down and went over the entire [p. 354] rap sheet; and he pointed out what happened; what his conviction was in each case, where he went, where he didn't go after the convictions and so forth.

Q. When you were looking at this rap sheet or the information you had on the respondent's prior convictions, did you find that there were any inconsistencies, other than those that we've noted, between what he would admit to or what he said about the offenses?

A. See if I heard that right. The rap sheet is very bare. It's very barren. And so he could tell me about those convictions; and what he said was certainly plausible; certainly could be correct.

Q. In the – that you reviewed in this case, though, did you receive information about his specific convictions, say, for example, in Washington and what the underlying sexual activity was?

A. Yes.

Q. And with regard to that information that you received, in comparing it to what Mr. Hendricks told you, did you find that there were inconsistencies between the two?

A. Yes.

Q. Dr. Befort – And let me just ask you this. You've indicated that you talked to the respondent on three separate occasions. Is that correct? One lengthy, two shorter?

A. Yes.

[p. 355] Q. And would it be fair to say that you've had the opportunity on two separate occasions, at least or two separate times, to observe the respondent and his behavior, things of that nature; and I'm talking about just observations, not as far as interviews or anything?

A. Usually when I went onto the ward, it was to talk to him or one of the other fellows I was evaluating. So very cursory, true; and I talked to other staff people.

Q. All right. You discussed with the staff people their observations of Mr. Hendricks?

A. Generally. Mostly I was looking for symptoms; was he displaying any behavior that would indicate other kinds of problems, that type of thing.

Q. And you've indicated that you have reviewed some reports in this case. Would it be fair to say that you reviewed a large volume of reports in this case related to Mr. Hendricks and his past conduct?

A. All together.

Q. Yes.

A. Yeah. Yes. There were quite a few.

Q. And then you've been asked to prepare an evaluation in this case. Is that correct?

A. That's right.

Q. Now, when you were preparing your evaluation, did you take into consideration any plans for Mr. Hendricks' future [p. 356] that maybe he expressed to you? And let me just ask you, did Mr. Hendricks tell you about any plans for his future, what he was going to do once released on parole?

A. If I'm understanding, I asked what he had to suggest or offer in regard to reassuring society that behavior of this sort wouldn't occur again if he were in society. Is that –

Q. Yeah. What did he tell you?

A. I'd like to quote if I can find it.

Q. If you would like, if I could assist you, it would be on Page 3 of your report.

Q. Starting with the third full paragraph?

A. That's not the one I was looking for.

A. He told me that he had to be awae [sic] of his propensity for the rest of his life. I can't find it right now. He said that he would like to go live somewhere where there weren't too many people, which would have a secondary effect of keeping him out of association with many youngsters.

Q. Did he indicate what area this might be or what kinds of location this would be?

A. He referred to mountainous regions, and I think maybe he referred to Virginia or Kentucky. I don't remember specifically.

Q. Did the respondent ever indicate anything to you about a halfway house that he might go live at after he was placed on parole, like Dodge House?

[p. 357] A. Okay. I don't think I have that in my report. I do remember when we discussed parole possibilities Dodge House. I had never been there; but he was kind of cynical, saying that was kind of a silly plan because there's a school nearby; junior high I believe he said. I don't know if that's correct or not.

Q. All right. Thank you. Now, looking at or taking into consideration everything that you reviewed in this case, your personal interviews with the respondent, your conversations about his behavior and everything with the staff at Larned State Hospital, based upon your experience, your training and your education, would you have an opinion as to whether or not the respondent, Leroy Hendricks, is a pedophile?

A. Yes, I have an opinion.

Q. What is that opinion?

A. I believe he is a pedophile.

Q. And with regard to that diagnosis of his condition as being a pedophile, would you have an opinion, based on everything I've said before, as to whether or not

he's likely to engage in predatory acts of sexual violence or sexual activity with children?

A. Yes, I do.

Q. And what is your opinion?

A. My opinion is that he is likely to engage in such behavior if permitted.

[p. 358] Q. And do you base that upon any specific factors that you can enumerate for us? I know we've gone through a lot of stuff here. Anything? You can just pare it down for us, too?

A. One of the – Well, there are several factors I cited and certainly come into play. One has to do with predicting future behavior, period. And it's generally agreed upon, I think, by the clinical community, but also by folks that use common sense, that behavior is a good predictor of future behavior. In other words, we behave in certain ways repeatedly, chances are that's the way we'll behave in the future; not certainly, but probably. And he has a long and admitted history of sexual behavior and sexual acting out with children over over many years. And I feel that that is a strong predictor of future behavior.

Q. Is there anything else that you feel is a strong predictor of future behavior?

A. Another has to do with the nature of the pedophilia disorder itself. It's known from my professional knowledge and experience that pedophiles tend to repeat their behavior, often frequently. And yet given that that is the nature of pedophilia, and since I believe he is a pedophile – that the probability of repeating such behavior goes up.

Q. In putting that in, you know, laypersons' terms, would it be fair to say that maybe one of the reasons pedophiles [p. 359] repeat their behavior is because it is a pleasurable sexual encounter for them?

MR. WEILERT: I object to the leading form.

THE COURT: Well, it is a leading question Sustained.

BY MS. BARNETT:

Q. Do you have any opinion as to why a person who is a pedophile would continue to engage in pedophilic behavior?

A. As to why, I do believe pedophilia is like some other disorder, such as alcoholism; but it's also like sexual behavior in general, whether it's abnormal or not. Let's admit it. Folks don't usually just engage in sex once. It's a behavior that is repeated by most people who engage in sexual behavior; and pedophilic behavior is sexual behavior; and like normal behavior, it tends to be repeated and very often frequently.

Q. All right. Thank you. Were there any other factors that you noted in Mr. Hendricks' life or history that caused you to have some concern about his ability do this again in the future?

A. I listed some more. One of those is that I didn't get a feeling, based upon the information from the historical records as well as what he conveyed to me, that he really appreciated the seriousness of his behavior. He certainly didn't seem to understand his behavior, which never helps in [p. 360] terms of trying to modify that behavior. He certainly hasn't demonstrated he can control

it to my satisfaction and would certainly indicate that those also would add to the argument that he's likely to act out if unsupervised. He has a large victim pool. He has acted out against children who are not known to him or if they are known, very briefly known. They're people outside the family, in the open community. So that would make any child a potential victim. So there are lots of potential victims, which, let's say, incest violator would not have. A pure incest violator would stick to family members or relations. The other is that he – He hasn't had, as far as I can tell, effective treatment for the condition. Back in the sixties, he did go to a hospital; and from what I read, the staff tried for months and months and months to work with him and actually felt they had done pretty well and even recommended he was safe to be at large.

Q. Did you talk to Mr. Hendricks about his treatment at this hospital?

A. Yes, I did.

Q. What did he tell you about it?

A. Essentially – I will go back. He said it was practice to be sent to that hospital if you were convicted of a sexual offense back in '63, and they did have a special treatment program going on at that time for sex offenders. He told me that he went to group sessions there. He described the [p. 361] program as experimental, by the way – I don't know what he meant by that for sure. But he gave the impression that the clients or patients themselves or inmates, if you wish, had a big say in the actual conduct of the therapy sessions. He remembers that the groups didn't deal just with sex offenses

alone but with related matters such as in his case inferiority complex, feelings of inadequacy and some other personality trait he couldn't recall at the time as well as a sexual deviancy. And he did say that or conveyed that and said that sometimes or often the participation by the member was, quote, "Really just an attempt by the group members to stay out of prison", unquote. He said he did not know specifically what the report about treatment effectiveness was, but it must have been favorable, he agreed, because the sentence was commuted or dismissed or something; and he was put back on parole for his previous offense.

Q. Did he indicate to you, then, that at some later point he went back to this same hospital?

A. Right. As we talked, I knew there was another occasion; and he said that he was sent back there after his next offenses in '67. He said that at that time his attitude was pretty negative, because he knew that he was going to be required to serve some time in prison and that he didn't think much of their program, anyway; and that he generally voiced that opinion, even though there was a brief period of [p. 362] time where he said he wanted to try. I did read something that even though the staff felt the prognosis was poor, they did ask for another ninety days to keep trying. Or maybe – I think it was ninety days. And at the end of that time, he was back to saying that he wasn't interested and was released back to court and then sent to prison.

Q. Would it be fair to say, Doctor, that when Mr. Hendricks was telling you about this that he used a little

bit stronger terms than saying he wasn't interested in referring to the program?

A. Yes.

Q. Would you – It may be difficult.

A. Oh, it's not difficult.

Q. Tell the jury what the stronger term was that he used, if you would, please.

A. He said he saw no reason to put up with the hospital's quote, "bullshit", unquote.

Q. Thank you very much, Doctor.

Now, you've gone through a number of risk factors for us that you have considered in reaching your opinion. Are there any others?

A. In terms of treatment, the fact that he did not participate in treatment while he was in prison here in Kansas also would indicate that nothing significant has probably happened to change the propensity or the tendency to [p. 363] act out in that way. I think I mentioned that after I talked to him, even though he says he must be a pedophile because the law defines it that way, never conveyed that he really thought that was necessarily true. When talking about impact on his victims, he usually used a conditional statement, such as, "If it was harmful, I certainly don't want to harm anybody; and I wouldn't do it again if it was indeed harmful", which does not – It's not very convincing that he really appreciates the situation. His – I'll call it self-protective minimization – I don't think is – is good. Now, the situation he was in, it's understandable. But it is my understanding that in order

for a person to increase the probability of avoiding offense in the future, full disclosure, admitting to the full extent of one's feelings, fantasies, urges and behavior is a very important component for effective outcome.

Q. During your conversations with the respondent, let me just ask you, did he ever show any signs of remorse for what he did?

A. Probably as close as he came was when I asked him about re-offense, whether he would commit again. Besides saying no, because he doesn't want to go to prison again, he also did say that if indeed what he did could be harmful, he wouldn't want to do that again.

Q. That was the closest he came to expressing it?

[p. 364] A. Yes.

Q. Were there any other factors that you considered important in making your evaluation and giving your opinion for the –

A. I think those are the main ones.

MS. BARNETT: All right. May I have just a moment, please, Your Honor.

THE COURT: Yes.

BY MS. BARNETT.

Q. One final question, Doctor, if it were made known to you that Mr. Hendricks had testified earlier today and had made the statement when asked about his ability to re-offend or not re-offend, stated that the only way he could guarantee not re-offending was if he was dead, would that reaffirm your belief in his particular

case that he is likely to engage in predatory acts of sexual violence in the future?

A. It would reinforce it.

MS. BARNETT: Thank you very much, Doctor. I have no further questions at this time, Your Honor.

THE COURT: Very well. Cross examination.

MR. WEILERT: Thank you, Your Honor. I wonder if we might take a very brief recess.

THE COURT: Mrs. Soper, we're going to take a short recess. Would you please escort the jury to the jury room.

[p. 365] (Pursuant to the recess, proceedings continue outside the presence of the jury.)

THE COURT: All right. We are all assembled outside the presence of the jury. Any matters to put on the record before we proceed?

MR. WEILERT: No, Your Honor.

MS. BARNETT: No, Your Honor.

THE COURT: I'll ask Mrs. Soper to bring the jury back in. Doctor, would you go ahead and take the stand again, sir.

(At this point the jury returns to the courtroom.)

THE COURT: All right. We're all assembled again.

Mr. Weilert, are you ready for cross examination?

MR. WEILERT: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. WEILERT:

Q. Dr. Befort, I'd like to start off and ask you if in your the experience that you have related to us you have any specialized training in the evaluation of sex offenders?

A. Specialized training?

Q. Yes, sir.

A. I don't think I've had specialized training beyond the [p. 366] years of, you know, workshops and getting my license renewed. There were many occasions when the topic of evaluation and treatment sex offenders were involved. And certainly I've done a lot of evaluations. So by experience, I developed some competency, I believe.

Q. And those evaluations of sex offenders that you have done, have you been supervised in any of those?

A. Originally, when I was getting my license, I was supervised until I became head of the department by another licensed psychologist.

Q. Okay. How many evaluations of sex offenders did you do while you were being supervised?

A. It would have been up to five. I have no way of knowing. I'm sure there were many dozens probably hundreds.

Q. In your evaluation that you did of Mr. Hendricks, you said that you used some historical data

that you had gathered from various sources, the interview with Mr. Hendricks, the MMPI and one other psychological test. And was there anything else that you used?

A. Behavioral observations short time we had. That was indirectly.

Q. Okay. Now, from those sources, did you determine whether Mr. Hendricks was mentally ill?

A. Did I? No, I ruled it out, which means I did not find him to be mentally ill.

[p. 367] Q. When you are doing an evaluation regarding the competency of person – person to stand trial, are you looking primarily at whether or not he understands what's going on around him and whether he can assist in his defense That's the main question to be answered at this time?

A. In a nutshell, yes.

Q. Now, in discussing personality disorder, you didn't diagnose Mr. Hendricks as having any personality disorder, did you?

A. That's right, I did not.

Q. And there are, what, about eight or so in the DSM-IV?

A. Something like that.

Q. He doesn't have any of those?

A. Not that I – not that I think.

Q. And a personality disorder, that is a well-defined concept in the psychological and psychiatric fields, is it not, because of its inclusion in the DSM-IV?

A. Yes, since it's been in the DSM period. There are other versions, also. It's been recognized, and there's been greater reliability and acceptance among the clinical community as to what a personality disorder is.

Q. And in talking about the diagnostic manuals, essentially DSM-IV, now that went into use, I think, about June of this year, did it not?

A. Not in my opinion, it didn't. It still isn't in general [p. 368] usage. It came out, I think, in May. But APA recommended that it be implemented preferably by 1995.

Q. And one of the reasons for the DSM-III-R would have been the one you were using; and the DSM-IV is to give some more objective standards to diagnosis, is it not?

A. That was one of the reasons, yes.

Q. And to get an even greater reliability?

A. Yes.

Q. So that means what you're trying to accomplish or what the APA is trying to accomplish is if you have two psychologists, and they're looking at the same person, and they use the same criteria, they ought to come up with the same diagnosis?

A. Looking at the same data, right.

Q. Okay. Now, that's rather important in the psychiatric and psychological fields, is it not, for evaluation and treatment purposes?

A. Yes.

Q. Okay. The term "mental abnormality", that is not defined anywhere in the DSM-III, 3-R or IV, is it?

A. As far as I know, it's not.

Q. So it would be improper for a psychologist or a psychiatrist to make a diagnosis of a mental abnormality, would it not?

A. In terms of a formal diagnosis, correct.

[p. 369] Q. Yes, sir.

Q. In your experience, would you agree that the causes of a person's behavior in any given circumstance are multi-dimensional?

A. Yeah, behavior is usually multi-determined.

Q. Okay. And that includes such things as the environment in which a person finds themself or the other people around, the mood that he – he or she is in at that time, just any – any number of things, doesn't it?

A. That's right.

Q. In fact, take yourself for an example. If you are presented with an identical situation on two different days, and one day you're in a real happy mood, and one day you're in a kind of a depressed mood, you may well react differently, might you not?

A. That's possible, yes.

Q. You have told us what congenital means, and I think you said that it's hereditary or genetic or biological?

A. Yes.

Q. And acquired is – An acquired condition is one – Well, first of all, what do you mean by "condition"?

A. As I interpreted it for the law, it has to do with the person's makeup psychologically, emotionally, in terms of traits, characteristics, things of that sort.

Q. Okay. But there's no indication in the statute that [p. 370] we're talking about as to what "condition" means, does it, is it?

A. Anyhow, the statute did not take that term out and define it.

Q. And a congenital or acquired condition, then would it also be correct that different people in the psychological or psychiatric fields would interpret those words in the statute differently than yourself?

A. It's possible.

Q. And those interpretations might well be as valid as yours, right?

A. As valid, okay.

Q. Now, can you tell us what emotional pardon me what congenital or acquired condition predisposes behavior at any given point in time?

A. Say that again.

Q. Is there any congenital or acquired condition that in and of itself would predispose behavior at any future point in time?

A. I think so.

Q. And there are? Do you think there are a lot of those?

A. Yes.

Q. And those might well be – Just give me some of the common ones that come to mind.

A. Personality types.

[p. 371] Q. Okay.

A. Personality disorder.

Q. Okay. Now, personality disorder, those are also defined in your field by the DSM-III, 3-R and IV, aren't they?

A. That's right.

Q. The definition of sexually violent predator, you read that, did you not?

A. Yes.

Q. And it says that means any person who who has been convicted or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence, right?

A. Yes.

Q. Would you agree, sir, that the terms "likely to" mean more probable than not?

A. Yes.

Q. So that that means there is a greater than 50 percent probability of the person engaging in some behavior in the future?

A. Getting into numbers makes it difficult but if you take the phrase literally, yes.

Q. Okay. Well, the statute – that's what the statute says, isn't it?

A. Right.

[p. 372] Q. So it means that there's a more than 50 percent chance that the person will engage in predatory acts of sexual violence at some point in the future, right?

A. Right. Given the preceding statements, yes.

Q. Okay. Now, we've had occasion to meet one time before, haven't we?

A. Yes.

Q. And that was at a deposition on the 22nd day of September of this year?

A. I think so. Couple of Wednesdays ago, I believe.

Q. If that's what it says, you wouldn't argue with it?

A. Okay.

Q. I wouldn't, either, if it wasn't – you had after that deposition – You had opportunity to review the testimony you gave in that, did you not?

A. Yes.

Q. And you went ahead and signed the deposition without any – making any changes to your testimony?

A. That's right.

Q. During the course of that deposition, did you refer to an article in the University of Puget Sound Law Review by Robert M. Whetstine (sp) M.D.?

A. I'm sure I did.

A. Yes.

Q. Okay. And you recall that in the deposition you said [p. 373] that you had read up to approximately page 612 of that article?

A. Roughly, yes.

Q. Which was an introduction and evaluation portion?

A. Right.

Q. Discussed an introduction and evaluation process?

A. Right.

Q. And you said that you agreed with the comments of the author in those sections?

A. Generally speaking, yes.

Q. In that article, on page 602, the second full paragraph, it says a another danger is that, quote, "mental abnormality, unquote.

MS. BARNETT: I'm going to object, Your Honor, at this time. Maybe we should approach the bench.

THE COURT: All right. You may approach.

(At this point there was an off the record discussion, after which the following:)

MS. BARNETT: I'm going to object on the basis of this, the witness isn't here from wash- or Western State Hospital records and ask the questions based on –

THE COURT: It's a learned treatise.

MR. WEILERT: He said it's an article that he –

[374] THE COURT: Is it recognized psychology?

MS. FOULSTON: There's a statute on that.

(At this point there was an off the record discussion, after which the following:)

BY MR. WEILERT:

Q. Let me rephrase my question, Doctor. In the course of your deposition, I believe you indicated that the mental abnormality being used to say that someone was predisposed to a certain type of behavior was kind of a circular argument, didn't you?

A. A certain kind of behavior. Certain behavior defined the condition and the condition predicted the behavior.

Q. And so that there really isn't a mental abnormality that a person has, unless he has that behavior. Is that right?

A. As I used it to do my evaluation, the way I interpreted the law.

Q. So if would it be correct, then, that the according to your interpretation, the abnormality used to or derived

from the sexual behavior is then used to the determine predisposition of that behavior?

A. I think you said that right.

Q. You've identified for us some, I think what you called risk factors. Is that right?

[p. 375] A. Yes.

Q. Okay. You said that one of them was the – just the nature of pedophilia. Can you tell us of any studies that would indicate what the nature of pedophilia is insofar as determining future behavior?

A. I can't quote any studies right here, and now that's just based on my knowledge.

Q. Do you have any studies which would indicate that a failure to appreciate the seriousness of behavior is an indicator of continued sexual deviant behavior?

A. Again I can't quote a study today. It's an accepted –

Q. Can you point us to any studies or learned treatises which would say that a person not understanding the reason for his behavior is an indication of future re-offense?

A. Again, I can't quote an article or a study. It's just knowledge in the professional community.

Q. Insofar as hospital is – pardon me – Insofar as treatment in a penal institution is concerned, can you show us any study which would indicate that failure to participate in such treatment is an indication that there will be future misconduct?

A. I don't have a study at hand, no.

Q. Do you have any knowledge of any learned treatises or study which would indicate that the failure to understand the impact that a crime of this nature has on a victim has any [p. 376] effect on the re-offense statistics?

A. I don't – again don't know of a study. That's just something I believe is true professionally.

Q. Do you know of any studies or learned treatises which would indicate that a self-protective minimization is an indication of – that there is a greater risk of future re-offense?

A. I think I used the phrase self-protective minimization earlier today in a different context. If it's done in a treatment context, yes, that, in my opinion, is a risk for re-offense.

Q. Do you have any learned treatises or studies which would back up that opinion?

A. Not that I know of right now.

Q. Do you know of any way, Doctor, that you can really tell whether or not someone feels remorse about their prior actions?

A. Can really tell?

Q. Uh-huh.

A. In the way you're implying, probably not.

Q. And I'm sure during your twenty – over twenty years out at Larned, you've probably seen some people who have the words come out of their mouth; but you didn't believe that, right?

A. Yes, sir.

[p. 377] Q. And so the fact that a person doesn't say it really isn't any more an indication of no remorse than a person who says it insincerely. Is that right?

A. They don't mean quite the same thing; but they are going in the right direction, same direction, yes.

Q. And this isn't – pardon me – After your talked with Mr. Hendricks, you said that he did say if it was harmful to his victims, he wouldn't want to cause any more harm. Is that right?

A. That's what he said, yes.

Q. Okay. Do you have any learned treatises or studies which would indicate that the showing of remorse is an indication in any respect of a propensity to re-offfend in the future?

A. I can't quote a study right now. It's just my professional information, knowledge.

Q. Would you agree, Doctor, that predicting the behavior of a person at any point in the future is nearly impossible?

A. Well, for nearly every behavior, I'm sure there's some behaviors you can be correct about.

Q. Now, you are talking about trying to predict behavior years into the future, would you agree that that is impossible?

A. We're talking about behaviors in terms of social choices and social behavior, yes; eliminate the physical behavior. [p. 378] In other words, I think twenty years

from now if I jump off a building, I'm probably going to go down. I probably can't jump a hundred feet in the air. Those you can predict with certainty.

Q. You're talking about the laws of physics; and those types of things, we assume, are going to stay the same?

A. Right.

Q. But as far as human behavior, you can't predict that, can you?

A. With a hundred percent certainty, it's very difficult, no.

Q. Have you ever had occasion to just where you personally have known persons quite – for quite some time; and then at some point in the future, they did something that surprised you because you didn't think that they would do it?

A. Certainly.

Q. And have you had people who you've known for quite some time that you thought in the future probably would do something, and they did it?

A. That's right.

Q. And are those people some that you had had extensive contact with?

A. I would assume so, whether personally or professionally.

Q. So you would agree that predicting with certainty is impossible?

[p. 379] A. In that context, yes.

Q. Now, in your work at Larned, sir, you do quite a few evaluations of persons who are being committed because of mental illness. Is that right?

A. Yes.

Q. Okay. And I want to make it real clear that's not what we're talking about here, is it?

Q. You're not saying Mr. Hendricks is mentally ill?

A. That's right. Mr. Hendricks – If I were evaluating him and asking for an opinion about mental illness, I wouldn't call him mentally ill.

Q. What you deal with in the mentally ill situations are people who because of their immediate past behavior someone feels it's likely that they're going to injure themselves or others. Is that right?

A. Yes.

Q. And in making those evaluations, is it not correct, sir, that you relied very heavily upon recent past behavior?

A. Yes.

Q. And in those evaluations, you're concerned with the problem that would be presented in the immediate future as far as that person's behavior and actions, right?

A. The word – yeah. Defining the word immediate as?

Q. Within a week or two.

A. To predict the future?

[p. 380] Q. Yes, sir.

A. We predict further than that. I mean, as much as a year, but not ten years; not fifteen years.

Q. Not even thirteen months, is it?

A. Typically not.

Q. Now, in those cases, do you know of any learned treatises or studies which show the accuracy of those predictions?

A. There are lots of studies out there. I don't have one at hand or immediately available.

Q. Now, would you agree with me, sir, that it is different to have thoughts or fantasies regarding deviant sexual behavior in the future than actually performing the acts of deviant sexual behavior?

A. Are those different?

Q. Yes?

A. Yes.

Q. I believe you diagnosed Mr. Hendricks as having pedophilia?

A. Yes.

Q. In making that diagnosis, did you have any information of behavior of a pedophilic nature, other than what happened back in 19- – prior to 1984?

A. That's all I had.

Q. And, of course, during that time from 1984 till your [p. 381] evaluation, Mr. Hendricks was in prison?

A. Yes, that's my understanding.

Q. In your evaluation procedure, did you have any information that Mr. Hendricks still was experiencing fantasies, sexual fantasies involving children?

A. Currently, no. No information to indicate that.

Q. Did you have any – pardon me – information regarding whether or not Mr. Hendricks had any sexual urges involving children over the last ten years?

A. No, I had no information in the past ten years that he's had sexual urges.

Q. In fact, didn't he tell you that since about 1989 or so he had no sexual urges of any sort?

A. He said he had not had erections.

Q. Okay. During the time that Mr. Hendricks was incarcerated, are you aware of any behavioral problems that he presented?

A. No significant ones that I know of.

Q. Pardon?

A. No signifcant [sic] ones that I know of.

Q. In fact, I think the only – You received a copy of the report from the Department of Corrections to the District Attorney, did you not?

A. Yes. That was a face sheet.

Q. And I think the only thing mentioned on there was some [p. 382] sort of possession of something he wasn't suppose to have?

A. Something unrelated to the issue at hand.

Q. And admittedly his – given his narrow living quarters, I guess, at the time, and societal setting at the time, you aren't aware of any problems he had in that situation as far as getting along with others and conducting his daily life?

A. As far as I know, it was satisfactory.

Q. Are you of the opinion, sir, that once a diagnosis of pedophilia has been made that that diagnosis stays with the person forever?

A. I'm sure that's not true in every case, but that's my understanding. If I were making it, I would tend to keep it.

Q. And that generally speaking would be regardless of whether or not the person had treatment or not, wouldn't it?

A. Most likely.

Q. And you mentioned alcoholism as maybe something similar, and that's where – Correct me if I'm wrong, but generally it's accepted that alcoholism, once a person is an alcoholic, they stay an alcoholic; but all they do is abstain from drinking?

A. The ones that are successful, yes, I think that's my understanding. I think most of my colleagues would agree.

Q. They aren't called "cured", are they?

A. No, they have a different term there. They're not drinking, anyway.

[p. 383] Q. Right. Abstain. And you would put pedophilia in kind of that same – pedophilia in kind of that same category as something that goes on as far as the diagnosis, but the behavior may be stopped?

A. Right.

Q. So simply by giving a diagnosis of pedophilia, you aren't saying that a person would re-offend in the future, are you?

A. Not by that single factor, no.

Q. Now, in your interpretation of the statute, pedophilia is a mental abnormality, isn't it?

A. Yes.

Q. And whether that interpretation is correct you would agree is open to –

A. – debate.

Q. – debate. You've said that the diagnosis of pedophilia in and of itself is not sufficient to predict future deviant sexual behavior. Is that right?

A. Yes.

Q. The risk factors that you listed, where did you come up with those, if they weren't out of any learned treatise or studies?

A. I hope from people who read all those learned treatises and summaries. I probably read some of them

myself, but they came from a compilation from Washington State professionals.

[p. 384] Q. And basically that was a list of – just a second here – about a page and a half long?

A. Yeah. I mean, maybe not that particular list but it is comparable to the one I used.

Q. Is there any of this risk factor on that list that you could give me an objective measure of how much that increases the risk of re-offense?

A. Where I would give a percentage, no.

Q. Yes. In addition to the risk factors that are some positive indicators about the lack of re-offense, if you will, aren't they there?

A. Yes.

Q. You didn't list any of those in your report, did you?

A. Right, I did not. Not in his case.

Q. Would it be your opinion, sir, that the lack of using – use of force or violence is a positive indicator as far as lessening risk?

A. Yes.

Q. You talked quite a bit about your evaluation or the interview you had during your evaluation. When you began that interview process, did you explain to Mr. Hendricks what the purpose of the interview was?

A. I don't recall if we went through that specifically, but I determined that he knew what the purpose was.

THE COURT: Excuse me, Mr. Weilert. Are you [p. 385] going to be much longer – your cross examination?

MR. WEILERT: Awhile, I think, yes, sir.

THE COURT: Well, I think this would be an appropriate time to take the evening recess. Ladies and gentlemen of the jury, I'm going to recess you. I'm going to request that you come back tomorrow at 9:30. I have several matters set. Please remember your admonitions. And with that I wish you a good evening, and be back tomorrow at 9:30. Thank you very much.

(Pursuant to the evening recess, proceedings continue the following day outside the presence of the jury as follows:)

THE COURT: We are reassembled outside the presence of the jury. At this time I would inquire, does either counsel desire to put anything on the record?

MS. BARNETT: No, Your Honor.

MR. WEILERT: No, Your Honor.

THE COURT: Very well, then. I will ask Mrs. Soper to escort the jury back from the jury room.

Dr. Befort – Is he available? Doctor, would you go ahead and come on back up.

(At this point the jury returns to the courtroom.)

THE COURT: Good morning, ladies and gentlemen [p. 386] of the jury. We are ready to resume in this case.

Mr. Weilert, when we recessed yesterday evening, you were on cross examination of Dr. Befort. If you would continue, sir.

MR. WEILERT: Thank you, Your Honor.

CONTINUED CROSS EXAMINATION

BY MR. WEILERT:

Q. Good morning, Dr. Befort. You are the same Charles Befort who was testifying yesterday, and you understand you're still under oath?

A. Yes.

Q. In going through some of the factors that you said posed a risk of re-offense yesterday, I wonder if we can go through some of those and see if you can give me any kind of quantitative number, a percentage of how much each of these factors increases the risk, if you would?

A. I can say that I won't be able to.

Q. On any of them?

A. No, not a number.

Q. Okay. And can you tell me whether it's a slight risk or a great risk?

A. In some cases, I might be able to do some of that.

Q. Okay. If it's what you would term a great risk, can you put a number on that so – How big of percentage of a risk it is?

[p. 387] A. No.

Q. You indicated, I believe, also that there were some factors that in your opinion would tend to indicate a low risk of re-offense or a lower risk of re-offense?

A. Yes, could lower the argument about re-offense, yes.

Q. Okay. And we talked about one of those being the lack of any physical violence or force. Do you agree with that?

A. Right. If that occurs, it goes up. If it doesn't occur, it goes down.

Q. Okay. And do you agree, sir, that a person accepting responsibility for his actions would decrease this risk of re-offense?

A. Yes.

Q. Would the fact that the person at the time of the acts was alcohol and drug free and continued to be, would that decrease the risk of re-offense?

A. In my opinion, yes.

Q. Would the fact that there was no bizarre or ritualistic behavior, would that decrease the risk of re-offense?

A. Bizarre could be psychotic. Ritualistic could be something else. Ritualistic abuse, if that's absent, certainly that would be in favor of saying a person isn't as great a risk of re-offense as a person who does engage in ritualistic behavior.

Q. And the term "anti-social personality disorder", Miss [p. 388] Barnett asked you some questions about that yesterday?

A. Yes.

Q. Now, you're not saying Mr. Hendricks has that the diagnosis, are you?

A. I do not give him that personality disorder diagnosis.

Q. So the lack of an anti-social diagnosis, that's also a sign that re-offense is less likely, is it not?

A. If he has it, it's worse.

Q. In your profession, Doctor, isn't it correct that you have several scientific journals that provide information about new or even old developments in your profession?

A. Yes.

Q. And would you say it's important to keep up with those journals in order to stay current in your field?

A. Yes.

Q. When we were talking yesterday about alcoholism being at least in some respects similar to pedophilia, that once the person is an alcoholic or is a pedophile, there's not a cure but only control. I think that's what you say.

A. That's my opinion, yes.

Q. Okay. And I think we were trying to come up with the word recovering alcoholic?

A. That was it.

Q. Okay. Now, Doctor, if a recovering alcoholic came up to you and said, "Doctor, I guarantee that I never am going to [p. 389] take another drink", what would you think of that?

A. Depending on the context, if I felt he was sincere, trying to convince himself as well as me, I would see that as a positive sign.

Q. Could it also be interpreted as a negative sign that he wasn't recognizing the nature of his illness?

A. I said, yes; depends on the context, right.

Q. And, in fact, if the person, an alcoholic, came up and said, "I guarantee I'm never going to have another drink", that's really an exaggeration of what he can guarantee, isn't it?

A. It depends on his perspective, his comprehension of the disorder, his motivation.

Q. So when Ms. Foulston asked you yesterday if you took Mr. Hendricks' statement that he couldn't guarantee that he would molest a child, you said you think that shows a risk factor for him to re-offend? Isn't that what you said?

A. With regard to his statement about guarantee?

Q. Uh-huh.

A. I don't remember Mrs. Foulston asking that but –

Q. Or Pardon me – Miss Barnett?

A. Okay. He didn't tell me that, but, again, depending upon context, if he's being realistic, saying, you

know, "I'm gonna try my darndest. It's my intention not to do it again, but I can't guarantee it" – which could imply two things. [p. 390] One, at least he's trying; and the other is he's not sure. So it can go either way.

Q. Mr. Hendricks said that here in the courtroom yesterday on the witness stand, do you think that would be an indication that he was trying to be truthful with the jury?

MS. BARNETT: I'm going to object. Witness cannot comment on credibility of witness. That's for jury to determine.

THE COURT: Sustained.

MR. WEILERT: Did the Court make a ruling?

THE COURT: I sustained the objection.

MR. WEILERT: Thank you. I didn't hear you.

THE COURT: Yes.

BY MR. WEILERT:

Q. Okay. In your testimony yesterday, I believe you expressed an opinion that Mr. Hendricks was a sexually violent predator as defined by the statute?

A. In my opinion, yes.

Q. And realizing that to make that opinion you have to be saying that it is more than 50 percent probable that he will re-offend at some point in the future. Is that what you meant to say by that?

A. That's what we agreed upon yesterday, yes.

Q. And do you have any basis in any research in the psychological or psychiatric fields that would support that [p. 391] opinion?

A. Not that I can quote you today, no.

MR. WEILERT: Don't have anything else. Thank you, Your Honor.

THE COURT: Any redirect?

MS. BARNETT: Yes, Your Honor.

REDIRECT EXAMINATION

BY MS. BARNETT:

Q. Mr. Weilert yesterday during the beginning of his cross examination talked to you about analogizing alcoholism to child molesting. Let's clarify that just a minute, though, Doctor. If you are an alcoholic and you drink, who ultimately do you hurt?

MR. WEILERT: Objection. Its' argumentative and calls for pure speculation.

THE COURT: Well, I'll sustain the objection at this time.

BY MS. BARNETT:

Q. Doctor, by using alcoholism as a comparison tool here in the courtroom, did you mean to imply that alcoholism has the same ramnifications [sic] or effects on other peoples' lives that child's molesting does?

A. Not the same.

Q. All right. Thank you, Doctor. Now, I believe that Mr. Weilert talked to you about using force or violence; and [p. 392] would that be a factor to consider. Would it be a factor to consider if someone threatens a child in order to gain sexual favors from them?

A. Yes.

Q. Would that tend to indicate to you that that's a factor to consider in whether they're likely to re-offend or not?

A. In terms of re-offense and prognosis, yes, it is a factor.

Q. And that would go to prognosis, I believe you said. Is that correct?

A. Right.

Q. Now, I think sometimes when we're talking about child abuse cases, maybe we stereotype the type offenders that are involved in those cases. Has it been your experience that most child molesters are people who beat up their victims to get sex from them or threaten them with weapons in order to gain sexual favors?

A. No, not – not weapons usually or physical force. Certainly those do occur.

Q. But that would not be the majority of the cases, would it, Doctor?

A. In the majority of cases I worked with, there hasn't been in most of the cases – have not involved brutal physical violence.

Q. Have you ever worked with victims of child abuse, [p. 393] Doctor?

A. Yes.

Q. Have you had contact with children in your endeavors as a psychologist?

A. Yes.

Q. Has it been your experience that children are Well, let me ask you, what is your experience with children as far as victims?

MR. WEILERT: I object, Your Honor. It's outside the scope of cross and irrelevant to anything we're dealing with here.

THE COURT: Well, I'm going to sustain the objection at this time as being outside the scope of cross examination.

BY MS. BARNETT:

Q. Doctor, based upon your conversations with Leroy Hendricks and your review of the records you've been provided, have you seen anything that indicates any motivation on his part to change?

A. Any motivation?

Q. Yes.

A. Yes, I've seen some.

Q. What?

A. He is – I believe he would like to stay out of prison. I think that his conditional statements, "If I have

caused [p. 394] harm or would cause harm", there's probably some of his – feeling on his part that he prefer not to hurt kids. He would rather believe that what he does is harmless.

Q. So you're indicating that at least Mr. Hendricks – He would prefer to believe that his behavior with children has not hurt them in any way?

A. He would certainly like to believe that.

Q. Now, you've made the statement that he made a comment he doesn't want to go back to prison. Does someone like Mr. Hendricks indicating that that's part of their motivation not to re-offend, does that show any great insight into their problem or what they need to do to change their behavior?

A. It doesn't warrant against it. If that's the sole or nearly sole reason you want to question he – how strong motive that is. And whether that means insight or not, you're going to have to ask for the questions.

Q. Doctor, again, referring to the other information that you reviewed in making your evaluation of Mr. Hendricks, it was brought to your attention that he had been diagnosed with other personality disorders. Is that true?

A. In the past.

Q. Yes?

A. Yes.

Q. Do you happen to recall what those were?

MR. WEILERT: I object, Your Honor. It's [p. 395] irrelevant. Dr. Befort's made it clear that he doesn't see any other personality disorder in Mr. Hendricks at the present time. Anything past.

THE COURT: I'll overrule.

BY MS. BARNETT:

Q. You may answer, Dr. Befort.

A. According to my report in 1964, let me be very careful here. He was diagnosed as having a psychopathic personality disturbance, sexual deviation. That's one diagnosis.

Q. All right.

A. That diagnosis comes from the first manual, the Diagnostic and Statisticual [sic] Manual, and as far as I can – I didn't use that manual. I came in when the DSM-II was vogue. But I looked that up; and they don't mean the same thing; or they didn't mean the same thing in terms of personality disorder in that regard as we mean today by illegible standards.

Q. But at that time by those standards and by those definitions that was what he was diagnosed with having?

A. If we were still using that manual, yes. That's where you would put it.

Q. All right. Thank you. Now, in your discussions with Mr. Hendricks and your review of his records, would it be fair to say that you saw a progression in his sexual deviancy from let's say exposure to fondling or light touching to oral [p. 396] sodomy, sexual intercourse?

A. That's an example of progression. Now, he admitted to progression but not to that extent. He talked about being a person who exposed himself initially, and then his deviant behavior involved little girls and then eventually both sexes.

Q. When you see a progression of sexual deviancy like that, is that something that you would consider to be a risk factor weighing against someone being at large, where they have a large victim pool, as you said?

A. Progression is fairly common in these kinds of behavioral patterns. If it's not there, that certainly would bode well for prognosis or future behavior if he stays at the level of being an exhibitionist; but if there's evidence he's going on, then you waive [sic] the flag and say – need to stop this.

Q. And, Doctor, let me ask you hypothetically, based upon your past experience and your past training and everything, have you looked at studies and reviewed articles and treatises and things of this nature that deal with discussing the behavior, future behavior, that type of thing?

A. Oh, yes.

Q. And when you were talking to Mr. Weilert about those things, I noticed that you weren't able to cite – and you referred to anything –

[p. 397] A. No, I couldn't cite particular studies.

Q. But you have those things in your background and training, don't you, Doctor?

A. Yes, I consider that I have the knowledge of the average, competent clinician in regard to those things.

Q. When we're talking about statistics, numbers, treatises, studies, things of that nature, let me ask you if in that same vein of things that people use to make determinations if you ever heard of the phrase "common sense"?

A. Sure.

Q. Do you consider yourself to be a person with common sense, Doctor?

A. Yes, I do.

Q. And do you feel that using common sense in your everyday practice as a psychologist is necessary and appropriate?

A. Certainly a part of the things you need to use to do a good job.

Q. In looking at this particular case involving Mr. Hendricks, I realize that your opinions previously stated have been based on your experience, your training, your qualifications; but would it also be fair to say that you used common sense in arriving at your opinions?

A. Yes, I hope I do that automatically.

MS. BARNETT: Thank you very much, Doctor. [p. 398] I have no further questions, Your Honor.

THE COURT: Any further cross examination?

MR. WEILERT: Thank you, Your Honor.

RECROSS EXAMINATION

BY MR. WEILERT:

Q. Doctor, this diagnosis of a sociopathic personality disturbance, sexual deviation in DSM-I. That's generally the same as pedophilia in DSM-IV, is it not?

A. Let me explain. I think the DSM-I – I can look, but I think I can recall correctly there is suppose to be a specification after that last phrase in regard to what area, whether it's exhibitionism, pedophilia. I did not have that on the information. I wrote this report. But, yes, that's – That's where you put sexual deviations.

Q. Okay. So this sociopathic personality disturbance, that was back in what 1963, is the same thing you're saying now is pedophilia?

A. As I understand that manual, yes.

Q. Okay. It's not any other kind of personality disorder, is it?

A. That's right.

Q. It wouldn't fit in any of the categories of personality disorder and DSM-III-R or DSM-IV, would it?

A. Not as I read it.

MR. WEILERT: That's all I have. Thank you.

[p. 399] THE COURT: Any further redirect examination?

MS. BARNETT: Yes, Your Honor.

FURTHER REDIRECT EXAMINATION

BY MS. BARNETT:

Q. Along with that diagnosis, Mr. Hendricks was diagnosed as having passive aggressive personality trait disturbance, wasn't he, Doctor?

A. I think so.

MR. WEILERT: Your Honor, I object. It's outside the scope of the recross examination. Miss Barnett wanted to get into anything else, she had her opportunity.

THE COURT: At this time I'm going to overrule simply because of – Well, I'll overrule.

MS. BARNETT: Your Honor, may I approach and get Exhibit Thirteen, please.

THE COURT: Yes.

BY MS. BARNETT:

Q. Doctor, just for the record and clarification, I've placed in front of you an item marked as Petitioner's Exhibit Number Thirteen. Did I show you that exhibit sticker on the front of that?

A. Yes, you did.

Q. And I referred you to I believe it's the third or fourth page in that packet, dated 1-15-68. Does that assist you at all?

[p. 400] A. Yes, that's correct.

Q. Does that refresh your memory at all about whether Mr. Hendricks –

A. Right, I have it in my report. Also I'm trying to match up the dates. Yes, that's the diagnosis that was given at Western State Hospital.

Q. And that would be a personality disorder, passive-aggressive personality trait?

A. May I check?

Q. Yes, please.

A. There's obviously one in that manual. I think there still is in the DSM-I.

A. I'm ready to try that, I think.

Q. Okay.

A. In the DSM, the initial DSM, which was used up to, I think, the late sixties. They broke things down into two categories regarding personality stuff, one they call personality disorder, which are – kind of fits what we mean today by personality disorder. However, they have a second section, which is called personality trait disturbance, which, as far as I can tell, going through it fairly quickly, is less – well, it looks like they've broken them into two categories and the personality trait disturbance would suggest if – just a moment, please.

Q. Let me just ask you this, Doctor; and I realize you're [p. 401] looking at DSM-I but under the current DSM that you use either III-R or IV, I believe that you said is supposed to be – come into play in 1995. Is there a passive-aggressive personality disorder.

MR. WEILERT: Your Honor, I object first of all to Miss Barnett asking another question about – The doctor has answered the one before.

THE COURT: Well, I'll sustain the objection. Let him try to answer the first question that was propounded, then, we'll go to the next one.

MS. BARNETT: Do you recall my previous question?

A. Yes. I'm going to have to do some studying on this. All I know is they make a distinction; and I get the impression that the personality trait disturbance is, I think, quantitatively a bit different, suggesting a little less permanent. Permanent is not quite the right – strong, – what have you.

Q. But he was still –

A. But under – Yeah, one of the personality trait disturbance – or two of them, rather – One is passive-aggressive personality. And one is sexual deviation. So when you diagnosis someone with personality trait disturbance, you then specify the nature of that disturbance by putting an appendage on the diagnosis. In this case, it [p. 402] looks like they did a complete job or at least reported completely. They did call it a personality trait disturbance, passive-aggressive personality, passive-dependent type with sexual deviation and pedophilia.

MS. BARNETT: Thank you very much.

THE COURT: Mr. Weilert, do you have any –

FURTHER RECROSS EXAMINATION

BY MR. WEILERT:

Q. Dr. Befort, what you just read, that's not comparable to any personality disorder in the DSM-III-R or IV, is it?

A. Not comparable, no.

Q. So for that report back in 1968 you can't sit here now and say that Mr. Hendricks has a personality disorder, can you?

A. Based just on that report, no.

Q. And based on that report and your examination, you've already said that he doesn't, haven't you?

A. In my opinion, that's right.

MR. WEILERT: That's all. Thank you.

THE COURT: You may step down.

THE WITNESS: May I be dismissed?

THE COURT: May he be dismissed?

MS. BARNETT: The State has no objection, Your Honor.

MR. WEILERT: I think he needs to stay, Your

* * *

[p. 410] call Dr. William Logan.

DR. WILLIAM LOGAN

called as a witness, having been first duly sworn, testifies as follows:

Supreme Court, U.S.
FILED
AUG 1 1996
CLERK

Nos. 95-1649, 95-9075

In The

Supreme Court of the United States

October Term, 1995

STATE OF KANSAS,

Petitioner,

v.

LEROY HENDRICKS,

Respondent.

LEROY HENDRICKS,

Cross-Petitioner,

v.

STATE OF KANSAS,

Cross-Respondent.

On Writ Of Certiorari
To The Supreme Court of The State Of Kansas

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DIRECT EXAMINATION

BY MR. WEILERT:

Q. Would you tell us your name please, sir.

A. William S. Logan.

Q. And what is your profession?

A. I'm a physician that specializes in psychiatry.

Q. And in the speciality of psychiatry, do you have any sub-specialty?

A. Yes, I'm a forensic psychiatrist.

Q. What is a forensic psychiatrist?

A. Forensic psychiatrist is one who works with patients who have some connection with both the legal system and the mental health system.

Q. And can you tell us what education you have had that would lead you – pardon me – that qualifies you for that occupation or profession?

A. Okay. I have a bachelor of science degree in biology with a specialization in microbiology. I also have a bachelor of arts degree in psychology. I have a doctor of medicine degree that was obtained from the University of Texas Southwestern Medical School in Dallas. I completed a [p. 411] four-year training program in psychiatry from Timberlawn in Dallas. I also completed a year of special study in law and psychiatry – It's called a fellowship – at the Menninger Clinic, Topeka.

Q. Aside from the formal education, have you had any other experience that qualifies you as a forensic psychiatrist?

A. Yes. For three years I worked as a forensic scientist, evaluations for the district courts at a place called the Medical Center for Federal Prisoners located in Springfield, Missouri. And what I would do – would look at individuals primarily charged with things such as presidential threats and bank robberies and then testify in various federal courts about their mental states or whether they were competent to stand trial. And in addition, after I completed my year of training at the Menninger Clinic, I was asked to be their director of law in the Department of Psychiatry and did that for eleven years until mid-1993, when I went into private practice.

Q. And what type of work do you do in private practice?

A. Combination of general psychiatry and forensic psychiatry.

Q. Have you published any materials in the area of forensic psychiatry?

A. Yes, I published a couple of articles; one about the evaluation of impaired physicians; and it came out of some – [p. 412] some of my work as a consultant for the Kansas State Board of Healing Arts. And one of the things that they would do was refer physicians to me that had some kind of emotional difficulty or substance abuse problems. On another occasion I published a study about presidential threat, technically addressing one part of that. Presidential – threats against the president.

Q. Perhaps it might be better if the court reporter was in front of him. Would that help you?

You can continue.

A. One article involved trying to predict which presidential threateners might make some actual approach to the president, since the secret service would often ask us for our opinion on those kind of issues.

Q. Do you have licenses to practice in medicine?

A. Yes, I do. In Texas, Missouri, Kansas and Nebraska.

Q. And you mentioned that you have specialities and a sub-specialty. Do you hold any certifications in those specialities?

A. Yes, I'm certified in both psychiatry by the American Board of Psychiatry and neurology and also in forensics by the American Board of Forensic Psychiatrists.

Q. And what does it mean to be certified by those boards, sir?

A. It means you have had to complete a training program [p. 413] that's recognized by the board, and you have to pass a written examination. And then those who pass the written examination have to pass an oral examination in the case of forensic psychiatry. You also have to submit a work sample for review by various examiners that has to pass criteria as well.

Q. Okay. In addition to the formal education you've told us about, have you attended other courses and seminars in the areas of forensic psychiatry?

A. Yes, I have.

Q. And would you tell us briefly what those have been, sir?

A. Primarily I get most of my continuing medical education at the American Psychiatric Association annual meetings; and then I also belong to several forensic organizations, the primary one being the American Academy of Psychiatry and the Law.

Q. And how long have you been a member of that association?

A. Oh, eleven years.

Q. How long have you been practicing in the area of forensic psychiatry?

A. Thirteen years.

Q. And a good part of that you said was at the Menninger Foundation?

A. Yes, sir, that's true.

Q. Are you a member of any professional organizations other [p. 414] than those that you have just mentioned?

A. The American Academy of Forensic Science is one that I belong to as as well.

Q. Have you ever held office in any of those associations?

A. Yes, I've been the Western Chapter president of the American Academy of Psychiatry and Law, currently on the editorial staff of their newsletter.

Q. Are you affiliated with any hospitals in the practice of forensic psychology – pardon me – psychiatry?

A. The Menninger Clinic. Also affiliated as a consultant with the State Security Hospital in Larned. The

Larned – part of Larned as well that treats civilly-committed patients and similar function as a consultant at Osawatomie State Hospital.

Q. In addition to taking courses, have you had occasion to teach courses in forensic psychiatry?

A. Yes. In fact, one of my job roles at the Menninger Clinic was the director of their forensic education program teaching issues about forensic psychiatry to their psychiatric residents or the people that are in training there, as well as running a forensic fellowship myself.

Q. Have you ever been called upon to give presentations at other seminars?

A. Yes.

Q. Other than the ones you've attended for your own [p. 415] benefit?

A. Yes.

Q. Can you give us an approximation of how many?

A. Oh, I have to look at my curriculum vita and count them. Looks like I've been asked to talk either about dangerousness or prediction of sexual or general characteristics of sex offender about 16 times before various different organizations which have varied anywhere from state hospital staff to a meeting of Shawnee County judges to the Trial Lawyers Association.

Q. Okay. And have you been recognized as an expert in any courts to give testimony as an expert?

A. Yes. Well, numerous courts throughout Kansas. I think at one point I count that I testified in approximately

five of the fifty states, and so I have been certified as an expert in all of those locations. Numerous.

MR. WEILERT: Thank you. Your Honor, at this time we would ask that Dr. Logan be permitted to testify as an expert.

MS. FOULSTON: No objection.

THE COURT: I'll so permit.

MR. WEILERT: Thank you.

BY MR. WEILERT:

Q. Dr. Logan, in the field of the forensic psychiatry, historically has that profession been called upon to render [p. 416] opinions regarding dangerousness or prediction of dangerous behavior?

A. Yes, psychiatrists and psychologists have been put to that role on a number of occasions and sometimes volunteer for it.

Q. Okay. Can you give the jury a historical background.

A. There was a time in the history of psychiatry and psychology, primarily in the late 1960's and late 1970's – There was a great deal of optimism about our ability to predict who might be violent in the future and who might be safe. However, beginning in the late 1960's through about the mid-1970's, there was a series of about five studies where for various legal reasons large numbers of mentally ill patients classified as dangerous were released to the community. I don't know if you want me to go through those studies. But essentially what it was found

out is that far from being able to predict who was dangerous – And that we were right only only about a third of the time. If we predicted that somebody was gonna be safe, we were right about 90 percent of the time. If we were going to predict who was gonna be dangerous in the future, we were wrong twice and right one essentially; and that caused psychiatry to take a look at how many people that might be detaining for treatment, when in fact two out of three of those individuals might not be dangerous. And since being in some kind of a [p. 417] institution involved some curtailment of liberty of that individual, psychiatrists got a lot more circumspect about the kind of predictions that they were willing to make. And typically what they tend to do after this point is refrain from making long-term predictions about how an individual will function in favor of more short-term predictions; like we might be able to tell you how somebody would do over the next three weeks or next week based on their mental state; but it is gonna be difficult if we are asked to predict how they are going to perform three years from now, five years from now. Instead, what was developed was assigning things that put people at either higher risk or lower risk for being some danger, but it is difficult to specify or say how much of a risk those individuals might be if they had some of the risk factors.

Q. You mentioned some studies that were done with the release of mentally ill persons. What were those? First of all, where did the population for those studies come from?

MS. FOULSTON: Your Honor, I object to no foundation at this point.

THE COURT: Now, in regards to what? I'm sorry? That last question? He's asking where –

MS. FOULSTON: Yes, Your Honor, he is inquiring as to what, quote, "global studies" – Dr. Logan has not testified to specific studies. We're talking in a [p. 418] very nebulous area.

THE COURT: Well, I'll sustain the objection. If you want to talk about specific studies and where the population groups came from, that would be fine.

BY MR. WEILERT:

Q. You mentioned that there were some studies done in the late sixties and early seventies, if my memory serves me correctly, where evaluations of dangerousness were tested. Is that basically correct?

A. Yes.

MS. FOULSTON: Your Honor, I object to the leading and suggestive nature of Counsel's questions on direct examination.

THE COURT: Well, I'm going to overrule. I consider that a preliminary question. You may continue.

A. Yes, that is correctly summarizing my testimony.

BY MR. WEILERT:

Q. Okay. Can you tell us where the population groups that those studies came from?

MS. FOULSTON: Your Honor, what studies? I object. There's no foundation.

THE COURT: Can we establish what studies were talked about in the sixties and seventies?

BY MR. WEILERT:

Q. Can you tells [sic] specifically what studies were done in the [p. 419] late sixties and early seventies?

A. Yes, I can.

Q. Would you do that, please.

A. Okay. The first study was one that resulted from the fact that the United States Supreme Court made a decision in a case that–

MS. FOULSTON: Your Honor, I would object again. The witness is not being responsive to the question. He's giving testimony about something that there's no foundation–

THE COURT: Well, I'll sustain. I just believe we're going – The question went to what were the studies.

BY MR. WEILERT:

Q. If you could just first of all identify the studies that you were talking about or would be talking about.

A. One of them involved release of nearly a thousand patients from New York State Hospital. Another one in Pennsylvania ruled in the release of 438 mental disorder offenders from their state hospital. There was a release of 386 inmates from a Massachusetts Center for the Diagnosis and Treatment of Dangerous Persons. Primarily these were dangerous sex offenders. A fourth study had to do with release of a number of individuals from Patuxent Institution, which was an institution designed in Maryland for the [p. 420] treatment of those

with anti-social personality who had been incarcerated. Another New York study had to do with 257 inmates found incompetent to stand trial.

MS. FOULSTON: Your Honor, I'm still going to— object on the basis that my understanding is that there are names for studies; there are identifications of individuals who perform studies; there are outlines for the studies. There are different types of individuals who are involved. Some of them could be murderers. Some of them could be robbers, thieves, arsonists. Some of them could be sex offenders. And there's no foundation that the relevancy of these studies is relevant to these issues in this court today. And when doctor says one was about release of a thousand patients in New York; one was about 438 here; one was 368 in Massachusetts; one was from Patuxent, Maryland; and one was anti-social, and one was this. That's not a foundation, and I would object.

THE COURT: Well, Mr. Weilert, please try to get more specific as to exactly what these studies were.

BY MR. WEILERT:

Q. Let's go first of all to the one from New York where you mentioned a thousand persons being released.

A. Okay.

Q. Who was the author of that study?

A. Guy named Kozol, K-O-Z-O-L, published in 1972.

[p. 421] Q. Where?

A. Start with New York. That's the wrong study. Excuse me. Let me find it.

A. Steadman (sp) was the primary author of that study in New York that I referenced.

Q. And do you have the name of the study, sir?

A. No, I don't have the specific article that it's published in; but basically it is called the *Baxstrom* study, named after the legal case that generated it.

Q. And do you know where it was published?

A. No, not the specific journal. I didn't bring that part of the chapter with me that gave the specific cite of that – of the particular journal reference. I could get that for you if you need that. A synopsis of it is–

MS. FOULSTON: Objection.

THE COURT: I'll sustain at this time.

BY MR. WEILERT:

Q. Okay. Is the *Baxstrom* study by Steadman (sp) recognized in the forensic psychiatric profession as an authoritative study of the release of inmates from a mental institution and their dangerousness predictions?

A. Yes, it is. Not just in forensic psychiatry but in psychiatry as a whole.

Q. Would you then tell us the details of that study, please.

[p. 422] MS. FOULSTON: Your Honor, I still object. There's no foundation.

THE COURT: Well, believe counsel is trying to establish some foundation. At this point in time the witness would be able to talk about the details of the study.

MS. FOULSTON: Your Honor, I still object on the basis of irrelevancy. There's been no showing that it is pedophiles. It's not relevant to the basis of this lawsuit. And I object on the basis that there is no foundation. This doctor can't even tell you where the study came from and what year it was published.

THE COURT: Well, I think the objection's somewhat premature at this point in time. He's going to talk about details of the study, which I would presume would include the subject matter and the individuals.

You may continue with your questions and lay the foundation.

MR. WEILERT: Okay.

BY MR. WEILERT:

Q. First of all, the people being studied, who were they?

A. They were a thousand individuals who had been transferred from the New York Department of Corrections to a hospital for the criminally insane in New York.

Q. And the hospital for the criminally insane, were they then released from that?

[p. 423] A. Not by clinicians. They weren't – There was a legal challenge to that transfer, and the court ruled that they had not followed due process in transferring from that institution; and subsequently they had to release a thousand of them.

MS. FOULSTON: Your Honor, object to the legal conclusions, the statements of counsel and the statements of the witness that are not supported in the evidence. No foundation.

THE COURT: In regard to relevancy, I'll sustain the objection at this time.

MR. WEILERT: Do you want me to argue from here; or do you want me to approach the bench, Judge?

THE COURT: You may approach the bench. (At this point there was an off-the-record discussion at the bench, after which the following in the hearing of the jury:)

MR. WEILERT: Your Honor, the whole idea is whether or not psychiatry can predict future dangerousness or future behavior study does deal specifically with groups of individuals who were released, even though they had been predicted to be dangerous to be at large. The State's position that the persons who worked with those who have been recorded to be dangerous, the type re-offense in the future [p. 424] through the terms of the study.

THE COURT: What is standard? How old is the study?

MR. WEILERT: We believe eleven years.

MS. FOULSTON: Your Honor, the problem I've got with this is if you remember the questioning by Mr. Weilert of Dr. Befort, "Name a treatise, name an article, name anything", and there is no foundation for this witness to testify, number one, off of these studies; number two, there is no showing that they are even relevant to

the issues in this case. They could be individuals that – In the Baxstrom study we're talking about people that were civilly committed going from one location to another. They're not from the Department of Corrections, and this guy doesn't even know the name of the studies and can't even cite to the studies. And I'm just not going to agree that he should be able to pull these things out of the air and testify to them.

THE COURT: Give you time to interview the witness, determine whether or not we need a hearing outside the presence of the jury. Since the State's objecting, I think we should go ahead and have a hearing outside the presence of the jury to determine this.

MS. FOULSTON: Judge, if Tom told us that what he was doing was to come in and say you can't predict – If he wants to give his opinion that he can't predict, that's [p. 425] his opinion; but I don't think that he can base it on something with no foundation.

THE COURT: Let's go ahead and have a hearing outside the presence of the jury.

(Proceedings continue in the hearing of the jury.)

THE COURT: Ladies and gentlemen of the jury, I'm going to excuse you back to your jury room at this time.

(The jury exits the courtroom.)

THE COURT: All right. The jury has been excused from the courtroom. As I indicated earlier at the bench conference, I had thought that we should resolve any problems by allowing interviewing of this witness. There appear to be several objections which the State

desires to lodge in regards to some of the evidence or testimony, I should say. That is going to be introduced through this witness. Therefore, at this time, Mr. Weilert, I would ask you to proffer the testimony of this witness in regards to all of these matters.

MR. WEILERT: Thank you, Your Honor.

CONTINUED DIRECT EXAMINATION

BY MR. WEILERT:

Q. Okay, Dr. Logan, let's go back to the idea of asking the psychiatrist or psychologist to predict future behavior. You said that historically your professions have been asked to do [p. 426] that. Is that correct?

A. That's correct.

Q. And that at one point in time up before the mid-1960's, your profession thought that that was possible? Is that right?

A. That's right.

Q. Now, as a result of certain studies that were done from the late sixties through say the mid-1970's, that opinion changed, did it not?

A. It did.

Q. Okay. The studies that were done to change the opinion of the psychiatric profession about prediction of dangerousness, what were they?

A. Do you want me to go through them individually?

Q. Yes, sir.

A. The first study was one published by Kozol, K-O-Z-O-L, in 1972. It was a ten-year study that involved 593 male offenders, most of whom had committed a violent sex crime and had been incarcerated at the Massachusetts Center for the Diagnosis and Treatment of Dangerous Persons. All of these individuals had a clinical examination, along with a full psychological test battery, a social history that was verified from multiple sources. 435 of the 593 were eventually released. Is this the kind of information–

Q. (Nods, indicating affirmative response).

[p. 427] A. Okay. Kozol and his fellow staff members recommended the release of 386 of these individuals as non-dangerous and opposed the release of 49 of them as dangerous. The Court decided otherwise in those 49 cases and released them anyway. They then did a five-year followup study measuring how many of these individuals became recidivists. And their criteria was recidivism by committing a serious and assaultive act.

Q. What was the result?

A. The result was that 8 percent of those that they predicted not to be dangerous became recidivists and assaulted someone; 34.7 of those that they predicted to be dangerous committed an assault.

Q. So, in effect, the predictions about future dangerousness were wrong 65.3 percent of the time. Is that correct?

A. That's right.

Q. What other studies occurred?

A. A second study was performed at the Patuxent Institution at Maryland. That is a treatment facility that I have personally visited and talked with the staff there, who conducted a study over a number of individuals who had at least three years of treatment and were brought before the court for release. Staff opposed the release of 286 of these individuals on the ground that they were still dangerous. But the Court went ahead and released them anyway, and they [p. 428] recommended the release of 135 others as being safe. They then followed their progress for the first three years after they were released. Of those that were released by the Court against the staff advice, recidivism rate was 46 percent, that – They had been released directly from the hospital that is, and then 39 percent if they had a conditional release. Of those patients that were also released on staff's recommendation, the recidivism rate was only 7 percent.

Q. So in that study, the psychiatrists' and psychologists' recommendation – pardon me – predictions of dangerous were wrong 54 percent of the time?

A. Between 54 and 61 percent depending on the population that they looked at.

Q. Okay. And what other studies?

A. Steadman (sp) did a subsequent study, at Patuxent, looking at this population again, and found that arrest rates for violent crime over a three-year period for inmates recommended by the staff for release, that is, predicted not to be dangerous was 31 percent that they

predicted they would be violent or recidivate, the relapse rate was 41 percent. There was only a 10 percent difference between the groups that were predicted to be violent and those that were not predicted to be violent.

Q. And they were again wrong somewhere between 60, 59 and [p. 429] 69 percent of the time?

A. That's correct.

Q. When was that study done, do you know?

A. 1977.

Q. And the first one from Maryland?

A. 1972.

Q. Okay. Are there others also?

A. Yes.

Q. Okay.

Q. What's next?

A. Well, the one that we initially started was the *Baxstrom* study. This resulted from a 1966 United States Supreme Court case called *Baxstrom v. Harold*. The specific legal cite on that – Essentially the ruling in that case resulted in the transfer of nearly a thousand persons thought to be some of the most dangerous in the State of New York from hospitals for the criminally insane to mental hospital. He did a report on the followup study on these individuals in 1972. And specific cite is an article by Steadman (sp) and Stevens called "Community Adjustment of the Baxstrom Patients", 1966 to 1970, published in the "American Journal of Psychiatry." I don't have this in my memory.

Q. Okay. What type of followup was done on both – of those thousand persons if were there predictions regarding their future dangerousness?

[p. 430] A. Yes, they did a followup of these individuals. They were all assumed to be dangerous by the fact that they had been in an institution for the criminally insane and by the virtue of the fact that they're being in that institution someone had made a prediction that they would in fact be dangerous. They followed these individuals for four years. Only twenty percent of these individuals were assaulted people either in a civil hospital or community over the next four years. Only 3 percent of them were ever sufficiently dangerous to be returned to the hospital for the criminally insane during that same four years. And they also looked at then for two and a half years out in the community smaller group of these 121 patients. They found only 9 or 8 percent were convicted of a crime, and only one of those convictions was for a violent act.

Q. and that would once again indicate that there was at least an 80 percent prediction of dangerousness?

A. That's correct.

Q. What other studies?

A. There was a study by and Steadman (sp) in 1976. It involves 257 defendants who had been found incompetent to stand trial New York State in the years 1971 and 1972. All of them were examined for determination of dangerousness by two psychiatrists. 60 percent were predicted to be dangerous, and 40 percent were predicted to be non-dangerous. [p. 431]They subsequently follow

them from the hospital in the community during a three-year period. They found that initially during the first few months of hospitalization, those that were predicted to be assaulted were slightly but insignificantly more likely to be assaultive. 46 percent versus 36 percent. After their release, they looked at their re-arrest for any kind of crime, and they found that 49 percent of the people that had been predicted to be dangerous by the psychiatrists were re-arrested for any crime. And 54 percent of the non-dangerous group were re-arrested. So in actuality the non-dangerous group had a higher rate of recidivism than the dangerous group did.

Q. And once again showing that the prediction of dangerous behavior in the future is at least 51 percent wrong?

A. Yes.

Q. Any further studies in that group?

A. No, those were the studies principally that were cited and summarized and Monahan had a great deal of information, called the "Criminal Prediction of Criminally Violent Behavior" by John Monahan, who is a psychologist at the University of Virginia.

Q. Miss Foulston is holding the monograph you are referring to?

A. That's right, sir.

Q. Is that recognized as a learned treatise in the field of [p. 432] psychiatry?

A. Yes, it is and in general psychiatry. It's not forensic. This actually had to do not with the practice of

forensic psychiatry as much as it did general psychology. Many times general psychologists and psychiatrists are confident as to make these predictions. John Monahan himself is a psychologist.

Q. And in addition to the studies that you have just told us about, are there other predictions of dangerousness in the literature specifically regarding sex offenders?

A. Yes, there's a whole host of them.

Q. And can you tell us first of all what time period we would be talking about?

A. I've reviewed a number of studies that stretch all the way through the early 1960's up through the early nineties; approximately 60-some such studies.

Q. And have you summarized your findings in those studies?

A. Yes, I've at least for myself made a little graph that reports some of the more salient characteristics of each of the studies.

Q. Let's start off with, if you can, first of all generalize for us the information contained as far as the ability to predict re-offense in sex behavior pardon me in sex offenders.

A. Very few of these studies if any of them have really [p. 433] tried to predict re-offense and sex offenders per se. Instead there are more outcome-studies patients who have either been treated or those who have not been treated and then followed for a certain number of years, which vary in length anywhere from six months up to as long as fifteen years. In some cases recidivism

has been measured in these studies generally by re-arrest rates; in some cases re-conviction rates; in some cases supplemental and by confidential questionnaires. Very few small, proportional studies.

Q. And can you tell us what range the recidivism rates are for those who are untreated sex offenders?

A. Okay. For those that are untreated – And I looked at 22 studies that had some information about that. The range was – would vary dramatically; 43 percent was the high; 32.8 percent was the low.

Q. How about those that were treated?

A. The average of those who were treated, recidivism rate was 12.56 percent. The range anywhere from 6 percent to 37.5 percent for those who were treated.

Q. What about for the untreated, what the average was? I don't think I asked that?

A. The – 15.1 percent of the untreated group. This is really lumping quite a bit of studies that have a lot of that, add a lot of variables together. There was also eleven [p. 434] newer studies of treated sex offenders, and recidivism rate there was 14.9 percent.

Q. So it would be clear that all of the studies regarding ricidivism and sex offenders would show, first of all, the average to be well below 50 percent? Is that correct?

A. Yes. And, in fact, it's quite unusual to find any recidivism rate that approaches 50 percent.

Q. And the studies that that information is taken from, you have had an opportunity to review them?

A. Yes.

Q. And are they published in journals dealing with either general psychiatry or forensic psychiatry?

A. Some of them are published in those journals. Some of them are published in journals that have to do with the area of criminology.

Q. Do you recognize them as authoritative documents regarding the information contained in them?

A. Yes.

Q. In your field of forensic psychiatry as well as general psychiatry, do you depend a great deal upon published studies to enhance your knowledge and keep you updated?

A. Yes, we do.

Q. In general can you tell us what's required before a study is published?

A. The study is submitted to a journal, and the editors' of [p. 435] that journal do what they call a process of peer review, or they screen the study for the proper methodological design and pertinance of the information and whether they think the information is reliable. And they have the ability to either accept the article for publication or refuse to publish the article.

Q. So by the time it is published, it's not only – It's already accepted by the publication itself or the editors board of publication?

A. Yes, authoritative in terms of being a relevant piece of the research, one that was methodologically sound and had valuable information to convey.

Q. And would you say that both general psychiatrists and forensic psychiatrists rely upon the information contained in those journals in formulating opinions?

A. Yes, they do.

Q. Based upon the history of your education, your experience, the articles and materials that you have reviewed, do you have an opinion to a reasonable degree of medical certainty whether or not future dangerousness of a sex offender can be predicted?

A. Yes, I do have an opinion about that.

Q. Okay. And let me add one more variable. Do you feel that it can be predicted to a standard of more likely than not or more than fifteen percent?

[p. 436] A. Yes, I have an opinion about that as well.

Q. Okay. What's the opinion about the latter?

A. My opinion about the latter is, given the nature of the current research available to us, I do not think we are able to say, given a certain individual, that their future proclivity to re-offend and commit any sex offense can be predicted more likely than not for more than 50 percent.

Q. And in fact is the American – You mentioned that you are a member of the American Psychiatric Association?

A. That's correct.

Q. And that's also the group responsible for the publication of the DSM Statistical – pardon me – Diagnostic manual, is it not?

A. Yes, it is.

Q. Has the American Psychiatric Association taken a stand regarding psychiatrists predicting future behavior or future dangerousness?

A. Yes, they have.

Q. Would you tell us what that is?

A. The position is that a psychiatrist should only do that in conjunction with educating his various – or whoever is requesting information about the degree of reliability with which that can be done.

Q. And if you were permitted to tell the jury the reliability of prediction of dangerousness or re-offense of [p. 437] sex offenders, what would you want to tell them?

A. In general?

Q. Yes.

A. Talking about sex offender as a category?

Q. Just talking about sex offenders.

A. Generally what we know from re-offense rates, it's unlikely whether treated or untreated that they will re-offend at a rate higher than 50 percent. Studies consistently show that the recidicism rate is much less than 50 percent, either with treatment or without treatment. So based upon that – of individuals in that category, you might be able to predict that some groups would re-

offend at a higher rate than others; but you would not be able to predict any one individual based on that designation would be more likely than not to re-offend.

Q. Do you have an opinion to a reasonable degree of medical certainty whether or not a psychologist rather than a psychiatrist would be in any better position to make such a prediction?

A. The standards for assessment are the same for these type of individuals in both disciplines, and there would be no difference between them in their ability to predict.

Q. In the literature and in your experience, are there factors that have to be taken into consideration as far as assessing risk of re-offense?

[p. 438] A. Yes. There are a number of factors that are examined and which you would examine a sex offender.

Q. Are there any of those factors that can be quantitatively analyzed to say if this is present, then there's a 5 percent higher arrest rate or anything of that nature?

A. In order to do that, you would have to compile a massive number of studies to get a large enough individual to make significant statistical findings. There are a number of things that can increase the risk of somebody re-offending; by what degree, we don't have the sophistication to say.

Q. Excuse me. Is there a difference in your opinion between a clinical evaluation of whether a person should be placed into treatment and a prediction of whether or

not that person is going to re-offend more probably than not?

A. Yes.

Q. Okay. Would you explain that for us?

A. In a clinical decision, you're simply advising the individual what would be in their best interest. Certainly if somebody has a risk of 30 percent, approximately, or 25 percent of committing some type of terrible crime, it's either in society's best interest or that individual's best interest that he leave treatment. But that's different than saying that individual will commit a certain act more likely than not, higher than 50 percent level. In other words, [p. 439] there are individuals who have a risk as low as 5 or 10 percent. But if it's committing a serious criminal act, I'm going to recommend clinically that they receive treatment.

MR. WEILERT: Your Honor, I think for our purposes that's all the questions I would have. I don't want to imply that if Dr. Logan were testifying before a jury that that would be the specific limits of what I would ask him, but that's the general – certainly the general areas.

THE COURT: All rignt.

THE COURT: Ms. Foulston.

CROSS EXAMINATION

BY MS. FOULSTON:

Q. Dr. Logan, you indicated that you are familiar with the text called "Predicting Violent Behavior, an Assessment of Clinical Techniques", by John Monahan,

which is a monograph that was published by the Sage Library of Social Research in 1981. Is that correct?

A. That's right, sir.

Q. And, in fact, as you were reading some documents, I read along with you. The pages that were taken directly from that book, pages 72 through approximately 80, dealing with outcomes of studies of clinical predictions involving the Kozol study, the Steadman (sp) study, the Baxstrom study, et cetera. Is that correct?

A. Actually, we've got different versions of the same [p. 440] thing. Monograph that I have got is "Clinical Prediction of Violent Behavior." It's like he wrote the same thing two places. My edition has pages 44 through 47.

Q. When I was reading through the language in this book – This would be the same author, would it not?

A. Same author, same ideas.

Q. Same materials?

A. Right.

Q. Same studies?

A. Right.

Q. Now, I'm going to direct your attention to the nature of this particular monograph; and it does say it is on "Prediction of Violent Behavior", does it not? And violent behavior has been defined by the author as that which he has confined his monograph or study to. Is that correct?

A. That's correct.

Q. And if you would please excuse me while I quote, in this monograph says Sted- – says Monohan, at page 26, "Violent behavior will be defined as by" and correct me if I pronounced the name incorrectly – "Megargee, 1976"?

A. Let me read what you are reading, and I'll look at it.

Q. Are you familiar with the name "Megargee"?

A. Megargee.

Q. That's what I said. I'm not pronouncing it correctly.

A. Okay.

[p. 441] Q. In this monograph, says, "Monahan Violent Behavior will be defined as Maegargee 1976, page 12, how he has defined it." Quote, "Acts characterized by the application or over threat of force which is likely to result in injury to people", end quote. Injuries shall be taken to mean physical injury. The notion of threat – in quotes – is included so that the definition will encompass armed robbery or other situations in which injury is threatened but not accomplished. The notion of, quote, "likely", unquote, is included so that a shooting at someone will be considered violent, even if the bullets miss. As Maegargee states, quote, "The use of the term includes but is not restricted to such criminal acts such as homicide, mayhem, aggravated assault, forcible rape, battery, robbery, arson, and extortion. Criminal behaviors not likely to result in injury to persons such as non-coercive thefts or vandalism are excluded, as are business practices,

which although injurious to people, do not involve the application of force. Do you recall reading that in Monahan's monograph on violent behavior?

A. I probably do. My understanding of what he was measuring in that was essentially –

Q. I just asked you, sir –

A. Do I recall personally reading that at some point? No, I don't personally recall reading that at some point. I [p. 442] don't have any reason to doubt what you said, and that is my understanding of what he was measuring.

Q. When Monahan is measuring and predicting violent behavior, he is doing it as Megargee would do it in those terms. And mayhem is like cutting off somebody's arm. That would be mayhem?

A. Some kind of physical assault.

Q. Physical assault. And so all of these are very forcible, violent types of crimes?

A. Right. The only sexual crime included in there is rape.

Q. Forcible rape?

A. Right. Most rapists –

THE COURT: Excuse me, Doctor. We're trying to take a record here. The reporter can only take one witness and attorney talking at one time, one person talking at a time. So please wait for the completion of the question before making a response. All right?

A. Yes, sir.

BY MS. FOULSTON:

Q. Okay. So then it would be a fair assessment, would it not, Doctor, that this book by Monahan upon which you rely and the studies that you have cited is not directed towards recidivism rates of pedophiles?

A. That's correct.

Q. When you talk about the recidivism rates of child [p. 443] molesters, as you have indicated from unidentified studies that you have talked about, those are based on re-arrest and conviction. Is that correct?

A. Primarily but not exclusively.

Q. And would you agree, Doctor, that most likely re-conviction rates underestimate the rate of re-offending, and therefore it's highly recognized that only a fraction of sexual offenses against children result in the offender being re-arrested or convicted, so that the statistics may be skewed by that lack of information?

A. That's the general consensus in the field; yes, it is.

MS. FOULSTON: Thank you. Your Honor, I submit that the testimony of this witness is irrelevant and immaterial. The studies that he has cited – and I have the book for the Court – deal with offenses that are not germane to the issues in this case. They are not studies of recidivism of pedophiles. They are studies other than what we are asking this jury to look at. An expert is to bring to the jury or to elucidate those issues that would be helpful for a clearer understanding. All Dr. Logan can

do is to confuse the issues by talking about recidivism rates for individuals who engage in mayhem, in homicide, in aggravated assaults and in armed robberies; and those are not relevant. We don't know if these studies involve threats on the president's life. That's an area he's been involved in – or [p. 444] whatever. But the bottom line is this witness should not be permitted to testify before this jury because the information he has is not relevant to the case at hand, and his opinion would only serve to confuse and to give information that is not appropriate in this case. Therefore, based upon this information, the State requests that the witness not be able to testify with regard to his prediction of violent behavior, based on the arguments of counsel. And the State – And, Your Honor, at this time I would tender the book to the Court. If there's any issue, I've read the whole book myself; and I can attest to the fact that there's not a thing in there regarding pedophiles.

THE COURT: Mr. Weilert, do you care to respond?

MR. WEILERT: Yes, Your Honor. The question that is going to be before the jury is whether or not they can predict human behavior at some point in the future. Now, in order to determine whether or not anyone can do that, I think that it's very relevant to look at what has happened in the past where – what situation have psychiatrists and psychologists tried to do that and how they succeeded. It is not in the opinion of the respondent necessary that that information be strictly related to the recidivism rates of sex offenders or even more specifically pedophiles. It all relates to the prediction of human behavior. It is very [p. 445] clear that in the first group of

studies discussed by Dr. Logan that we're talking about here people who have been in close contact with the people making the prediction for far longer than Dr. Befort was ever in contact with Mr. Hendricks; that even with that long-term contact, they were unable to get any closer than 65 percent wrong when they tried to predict if there was going to be any future violent behavior on behalf of these people. In addition, we have – Or Dr. Logan has cited specific studies dealing with sex offenders, and those – And I'm sure if the Court wants to take the time, we can go through and identify all of the articles he summarized. We can have them set forth which articles they are, who wrote them, when they happened and go through all of the details. But the fact is that all of them say that there is a recidivism rate, whether treated or untreated, on the average of 12 to 15 percent for sex offenders. The Massachusetts study cited in the first group was dealing with sex offenders, where the accuracy rates were, I think, 50 – My notes aren't very good – but certainly somewhere well over 50 percent in error as far as predicting future re-arrest and recidivism. The question of whether or not the re-arrest understates the amount of recidivism is something that could certainly be argued; but it is equally clear that there has to be some standard by which to go by. It is apparently well-recognized in the [p. 446] field. That's about the best method there is to predict recidivism or future dangerousness or to look at predictions of future dangerousness. And we would submit that Dr. Logan is very well-qualified to relate his opinion based upon that literature, and we can have him tell the jury the basis for that opinion as

set forth in that literature and the jury's final determination of whether or not they feel that it is possible to predict more probably than not that Mr. Hendricks will re-offend. That's up to them, but we certainly have the right to show the fallacy of a psychologist getting on the stand and saying, "Yeah, it's more probable than not that he is going to re-offend."

MS. FOULSTON: Your Honor, the State's position is very clearly drawn in that his opinions, as I said, I read along as he read along with all of the studies that are contained within that Monahan book – deal not with the specifics of this particular incidence. If they're talking about sex offenders, we can talk about sex offenders as people who are exhibitionists, sodomizers, forcible rapers, those who engage in any kind of sexual abhorrent sexual disorder except pedophilia. Those rates of recidivism have to be as individual as the if the woman is a battered spouse, sets fire to the bed her husband is in. She might not be inclined to kill a spouse again if she doesn't get abused. Therefore, her rate of recidivism as opposed to [p. 447] somebody who goes out and molests and molests and molests and molests – We're not talking about an isolated incidence here. We're talking about apples and oranges. I don't think there's any relevancy. 3.2 to 43 percent of untreated offenders. Are they murderers, homicidal maniacs, armed robbers, people who cut off arms and legs; or are they pedophiles? And this is not relevant nor material, and it's highly prejudicial to confuse the issues with the jury who can truly understand and probably don't even need the doctor to tell them what the word likely to re-offend means in the first place.

THE COURT: Well, at this juncture, I'm going to allow the respondent to put on evidence, limited evidence in regard to these matters. I believe matters raised by the State are matters that the State can properly bring before the jury by way of cross examination to show that there is no basis for the expertise or no basis for the studies. I believe the respondent in the area of human behavior and predictability thereof – I believe the respondent can present evidence, although, I agree with the State the ultimate issue in this case is going to be determined by the trier of fact, the jury. It does not revolve around any expert witness. It revolves around all of the evidence in the case as the jury determines. I will allow the jury to go to lunch. I'm going to recess this case until 1:30, and at

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[p. 465] background for all this stuff. Even though I still object to the ruling, that's what we intend to do.

THE COURT: All right. Ms. Foulston.

MS. FOULSTON: I think counsel's correctly recited the –

THE COURT: So am I safe to say we can bring the jury back in?

MS. FOULSTON: Well, you're safe to say that I don't know what my objections will be yet, Your Honor.

THE COURT: Very well. Then I'll ask Mrs. Soper to bring the jury back into the courtroom.

MR. WEILERT: Should Dr. Logan retake the stand?

THE COURT: Yes.

(The jury returns to the courtroom, and Dr. Logan returns to the witness stand.)

THE COURT: I hope you folks had a pleasant vacation in Shangri-la. We are ready to resume.

Mr. Weilert.

MR. WEILERT: Thank you, Your Honor.

REDIRECT EXAMINATION

Q. For the record, you're the same Dr. Logan that was testifying earlier this morning before that short break?

A. Yes, that's correct.

[p. 466] Q. And you realize you're still under oath, sir?

A. Yes.

Q. Okay. I believe kind of where we will left off was you were discussing some studies from the 1960's and the seventies regarding the prediction of violent behavior. And those are gathered together in a monogram by a gentleman named Monahan in "Clinical Prediction of Violent Behavior." Is that correct?

A. It is correct.

Q. Would you summarize for us the conclusions reached as to the result of those studies regarding the prediction of violent behavior?

MS. FOULSTON: Same objection, Your Honor.

THE COURT: All right. I'll note your objection for the record.

A. Psychiatrists tending to make long-term prediction of dangerous were right in no more than one out of three cases.

BY MR. WEILERT:

Q. Following the studies contained in that – pardon me. In addition to the studies contained in that document, are there other studies which deal with the prediction of recidivism for pedophiles?

A. Yes, there are.

Q. Okay. Have you had occasion to make a compilation of some of those studies?

[p. 467] A. Yes.

Q. And I believe you've actually compiled a list of about 60 sex offense studies, sex offender studies; and about 17 of those deal with pedophiles. Is that correct?

A. Somewhere in that nature, yes, exclusively or mostly pedophiles.

Q. Okay. Excuse me. Can you give us – once again summarize for us the findings of those studies regarding the prediction for re-offense by a pedophile?

A. Although the studies varied in the length of time they followed someone after they were released from treatment, none of the studies found that the re-offense rate exceeded 50 percent. The average percentage of individuals who re-offended was – with treatment was about

15 percent. The range went from as low as 3 percent to as high as 37½ percent. Studies that look at people who had not undergone treatment, the average re-offense rate was about 17½ percent; and the range went from 10 percent to 40 percent.

Q. Based upon those studies, sir, do you have an opinion to a reasonable degree of medical certainty whether or not a psychologist or a psychiatrist can predict the behavior – pardon me – can predict whether an individual is likely to engage in a sexually violent act in the future?

A. I do believe that there are risk factors that help you identify certain individuals that are –

[p. 468] MS. FOULSTON: Objection. Not responsive to the question.

THE COURT: Well, it will be sustained.

BY MR. WEILERT:

Q. Question, sir, is, based upon all of your previous experience, the literature that you have reviewed, do you have an opinion as to whether or not a psychiatrist or psychologist can accurately predict to a standard of more probable than not whether an individual is likely to engage in a violent sexual act in the future?

MS. FOULSTON: Objection to the form of the question, and it misstates the law that's applied to the case with regard to a finding of sexual predation.

THE COURT: Mr. Weilert, can you couch your question to conform to the statute?

MR. WEILERT: That's what I was intending to do. Thank you.

BY MR. WEILERT:

Q. I'll try one more time. Dr. Logan, do you have an opinion to a reasonable degree of medical probability or certainty, based upon all of your experience and the research that you have talked about, whether or not a psychologist or psychiatrist can make a prediction that a person is likely to engage in predatory acts of sexual violence, with the terminology "likely to" meaning more than 50 percent?

[p. 469] MS. FOULSTON: Your Honor, I object. That's not the law.

THE COURT: Well, I'll sustain the objection at this juncture.

MR. WEILERT: If we eliminate the portion where I said "define more likely to", do you have an opinion?

MS. FOULSTON: I object and ask that counsel restate the question without the additions and deletions to the witness. Just one question with a yes or no.

THE COURT: Mr. Weilert, would you go ahead at first please ask him in accordance with the language of the statute whether or not he has an opinion.

BY MR. WEILERT:

Q. Doctor, do you have an opinion held to a reasonable degree of medical probability or certainty whether or not a psychologist or a psychiatrist can accurately predict

whether or not a person is likely to engage in the predatory acts of sexual violence?

A. Yes, I have an opinion.

Q. What is that opinion?

A. My opinion is that the a psychiatrist or psychologist cannot predict whether an individual is more likely than not to engage in a future act of sexual predation from existing information we now have.

MR. WEILERT: I believe that's all I have. Thank [p. 470] you, Your Honor.

THE COURT: All right. Cross examination.

MS. FOULSTON: Thank you, Your Honor.

RECROSS EXAMINATION

BY MS. FOULSTON:

Q. Dr. Logan, I'm Nola Foulston. I believe we've had an opportunity to meet in court, and I want to ask you some questions regarding some of the opinions and the statements that you have made during court today. Do you understand the line of the questioning, sir?

A. Yes, I do. Thank you.

Q. Thank you. We had visited earlier in court with regard to Monahan's monograph called "Predicting Violent Behavior", a copy of that book I have. And are you familiar with that text?

A. Yes.

Q. And I believe that part of your testimony was the fact that this particular book said that only one in three predictions of violent behavior could be within any sense of the word accurate? Is that right? Is that correct?

A. Generally, yes, that's correct.

Q. In other words, if you had to strain all of the material from Monahan out, you would get that nugget of information; and that is the information that you gave earlier in your testimony? Isn't that correct?

[p. 471] A. Regarding predicting future violence, that's correct.

Q. All right. And Monahan's book, would you agree, is based upon the violent behavior definition that he gives from another psychologist named – And you are going to have to help me out with this – Megargee?

A. Megargee.

Q. I'm sorry. I can't say that. Is that correct?

A. Yes.

Q. So in this book Megargee talks about homicide predictability. Is that correct?

A. That's one of the things in his definition as an act of violence, yes.

Q. Is that the same motivation as pedophilia?

A. Depends on the pedophile. Generally, no.

Q. Okay. Megargee talks about mayhem. Can you tell me what mayhem is?

A. I'm not sure what Megargee means by mayhem. Generally my interpretation of it in lay sense means an act of uncontrolled violence, rage.

Q. Mayhem – let me help you out – means cutting off an arm, a nose, a limb, under the common law. Is the motivation of mayhem the same as the motivation of a pedophile?

A. No.

Q. Megargee deals with aggravated assault. Do you know what aggravated assault is?

[p. 472] A. Yeah.

Q. And would it be fair to say this would be assaulting, striking at another while armed with a deadly weapon?

A. Yes.

Q. That's the Kansas law definition? Is that correct?

A. It is.

Q. Is that the same motivation as one would find in an act of pedophilia?

A. No.

Q. Megargee also talks about the the crime of battery.

A. Yes. I didn't know if it was a statement or question. Yes, that's right.

Q. And do you understand that term to be the unlikely or the unlawful application of force to another?

A. That's correct.

Q. Punch someone in the nose would be a battery, would it not?

A. Yes.

Q. All right. Is this the same motivation that you have with a pedophile?

A. No, generally not.

Q. He also talks about robbery. Is that the same motivation as pedophilia?

A. No.

Q. He also defines it as arson. Is that the same [p. 473] motivation as pedophilia?

A. There maybe some overlapse but generally, no.

Q. He talks about extortion. Is that the same motivation as pedophilia?

A. No.

Q. He also discusses the forcible rape. Do you understand that term?

A. Yes.

Q. Do you understand this forcible rape to be a crime of violence versus a sexual offense?

A. Yes, I do.

Q. Is forcible rape the same as pedophilia?

A. No.

Q. So the definitions that are used by Megargee that are adopted by Monahan and the basis upon which this whole book is written are based on the violent and predictable behavior of people who have been convicted of homicide, mayhem, aggravated assault, battery, forcible rape, extortion, arson and robbery. Is that correct?

A. No, not if you mean that they've been convicted of that. It's an attempt to predict violence using one of those perimeters.

Q. That's the general nature of his –

A. Right.

Q. Right – his book. So his book is not about people such [p. 474] as Mr. Hendricks, who is a pedophile?

A. No, it's not.

Q. Thank you. You're not saying that there is never an occasion when the risk of an individual may be assessed. Is that correct?

A. Sort of a double negative. Yes, I am saying that there are situations when you can't assess the risk of an individual.

Q. And, in fact, as a psychiatrist, you have engaged in the prediction of a risk of individuals as part of your practice, do you not, when you can?

A. Sure. As part of my job as consultant at Larned State Hospital and Osawatomie State Hospital, I specifically have to do that.

Q. Certainly you are called upon all the time to examine whether a person may perform or do something, based on what you know about them. Isn't that correct?

A. That's right.

Q. And I think what you've told us here in court today when the smoke all clears is that if based on all of these different studies that you have relayed, the 17 dealing specifically or in part with people who are called pedophiles, that the percentages are somewhere between 3 percent and 40 percent of re-offenders. Is that correct?

A. That's correct.

[p. 475] Q. All right. So not even the experts can agree on that. Would that be a fair statement?

A. No, you have – That assumes that all these studies are the same, when in fact there is a wide of measure – wide range of treatments they're exposed to. Some of these are actually designed to see which treatments are most effective.

Q. There's different factors that would enter into different reasons why a percentage might be as low as 3 or as high as 40? Isn't that correct?

A. Yes, it is.

Q. And these studies – and if I am correct in my review of your literature and information, these deal with individuals who have been previously convicted, studied for a period of time, re-offend and are re-arrested or convicted? Isn't that correct?

A. The majority of those studies, that's correct. There are some other measures they may re-offend, but that's the main one.

Q. So, in other words, in order to get your number in the study and to be part of the percentage, you had to be caught? Isn't that correct?

A. Not in every case but in most cases that's – that's correct.

Q. Now, you're familiar with long-term recidivism of child molesters, you've indicated. Is that correct?

[p. 476] A. Yes, I am.

Q. And are you also familiar with the fact that these re-conviction rates may be underestimated?

A. People who have done research on this generally think that that maybe [sic] the case. We can't prove it, but they think that probably under-reported.

Q. And the reason that it's under-reported is because that only a fraction of the sexual offenses against children result in the offender being convicted, because in many of the instances they are not caught. Isn't that correct?

A. Well, that's true. Some of these states, though, I might add, deal with only conviction rates.

MR. WEILERT: Your Honor, he can answer the question.

THE COURT: Well, that question called for a yes or no answer. He can expand on another examination.

BY MS. FOULSTON:

Q. They don't get caught, do they?

A. Some of them don't.

Q. Dr. Logan, you have not personally examined Mr. Hendricks. Is that correct?

A. That's correct, I have not.

Q. In fact, have you ever even spoken with Mr. Hendricks?

A. No.

Q. What have you reviewed in connection with your [p. 477] preparation for this case as it relates specifically to Mr. Hendricks?

A. The only thing relates specifically to Mr. Hendricks was some testimony offered by Mr. Crask in an earlier hearing in this matter and the two reports prepared by Dr. Befort.

A. I just said Befort. Like your Megargee, I have to watch myself how I pronounce it.

Q. Dr. Befort, I think, is correct. So you have not had the opportunity to talk with Rose Loux, have you?

A. No.

Q. Have you had the opportunity to talk with Roger Morris?

A. No.

Q. What about Constance Herzog?

A. No.

Q. What about Steven McPherson?

A. No.

Q. What about David Erbeznick?

A. No.

Q. Have you talked to any young men from Wichita that were the victims of Mr. Hendricks' molestation?

A. No.

Q. Have you visited with any law enforcement officers regarding the characteristics and propensities other than what you referred in Dr. Befort's report?

A. No.

[p. 478] Q. And you have not conducted or done any psychological or psychiatric testing, have you?

A. No, I didn't evaluate this fellow. I just am testifying about recidivism.

Q. You have from time to given statements and lectures regarding recidivism?

A. I have.

Q. And in your papers and documents, you actually have some prepared papers and documents that you use. Is that correct?

A. There is a lecture that I provided that I gave the psychiatric trainees at Menninger.

Q. And I believe it is psychiatric workshop and legal regulation of clinical treatment. Is that correct?

A. Yes. It deals with a lot of things, primarily involuntary commitment.

Q. And I believe you pointed to pages 19 through 25 as those regarding volition and prediction of dangerousness. Is that correct?

A. Yes, it is.

Q. Reflecting your attention to those particular pages, if you would, Doctor, so that we're both on the same wavelength here –

A. I'm locating my copy as we speak.

Q. Start at 19.

A. Got it.

[p. 479] Q. Is it a fair statement so say that they are are many factors that one must consider in assessing the risk that an individual poses to society at large?

A. Yes, that's correct.

Q. And that in assessing risk, one must look at a number of different factors?

A. That's correct.

Q. And that many times people make mistakes because they don't look deeply enough at the individual. Is that correct?

A. Well – or get ancillary data, too.

Q. And it would be important in order to predict dangerousness. And I believe at page 22 you outline a formula for the prediction of dangerousness, do you not?

A. I do.

Q. And you include that it is important to know the prior history of violent acts. Isn't that correct?

A. Yes. This is the single best predictor of what he will do in the future.

Q. And so would it be a fair statement to say that behavior predicts behavior?

A. With certain modification, that's true.

Q. It would also be important to have a diagnostic assessment of an individual. Isn't that correct?

A. Yes.

Q. It would also be very helpful to have their mental state [p. 480] and identify if they're hostile, agitated, tense, delusional suspicious, grandiose, hypervigilant, hallucinating, et cetera. Is that correct?

A. Yes.

Q. It's very important as well to look at the treatment variables, is it not?

A. Yes, it is.

Q. And one of the gravest factors that one must look at is the motivation of an individual to change. Isn't that correct?

A. That certainly is important, how willing he is to comply with treatment or seek treatment or utilize it.

Q. Certainly. If a person is going to come in and take treatment, that would be important, wouldn't it?

A. Yes, I think it is important.

Q. And a person who says he doesn't need treatment would send up a red flag for you, would it not?

A. Sure.

Q. And it would be in very important for you to look at family support, would it not?

A. Yes, the situation to which the individual is going is always important.

Q. The social issues regarding the individual would be very important?

A. Yes. Whether he has a job – is certainly helpful to [p. 481] know that.

Q. One of the things you list is the history of compliance with outpatient treatment. That would be very important, wouldn't it?

A. Yes.

Q. So, in other words, a person that was told to go to treatment and refused to go, that would be significant, wouldn't it?

A. Yes, it would.

Q. Would that be a red flag to you on a predictability of someone's future dangerousness if you knew that they would not comply with outpatient treatment?

A. It would. But once again if we talk about the 50 percent criteria we have to study, the untreated pedophiles show they don't re-offend at more than 50 percent, either. But yes, it does indicate an increased risk.

Q. Would it be an increased risk that a person was a loner versus someone gregarious, that spent a lot of time with other people, peer relationships?

A. Not in relationship to pedophilia. Now, this list prepared for people trying to predict the things on that list, as you said earlier, wasn't relevant. But in terms of pedophilia, it's not as important as might be some other areas.

Q. You're not as concerned if somebody is a loner as [p. 482] opposed –

A. Certainly not all loners molest children and not all gregarious people refrain from it. So it's not a very good predictor.

Q. Would it be a very good predictor, Doctor, to know the environment to which the patient would be discharged?

A. If that environment has played a role in his offense in the past, it certainly would. And certainly if a person has – You want to keep track of things, ages of the children – might be disposed to where he might be living in relationship to grade schools, what his activities might be potentially with children; things of those nature, you would wants to know.

Q. Well, if you were told, Doctor, that, for example, a person might be paroled to a halfway house, say, that was right across the street from a junior high school, would that cause you a little concern?

A. Not only cause me concern – I looked at cases where they were going to do that and told them they they shouldn't.

Q. Nevertheless, that would be a red flag that you would consider in determining the risk?

A. Well, the way I view it, it's a risk you don't have to take, so why take it?

Q. And the proximity to potential victims or potential victim pool, would that be important to you in analyzing an [p. 483] individual's risk assessment for future dangerousness?

A. It would be one of the things I'd look at. Certainly you can't guarantee that anybody is gonna be totally out of contact with children, but certainly how frequently they might come in contact with them is a factor.

Q. Doctor, turning to page 23, you have at number 12 the decision table for analyzing the risk of releasing a patient, do you not?

A. Yes.

Q. And this is a progressive list that you would ask if you were evaluating someone; to each question, if you receive a response, it gives you instructions on where you should go with that response. Is that correct?

A. Yes. The list isn't progressive, by the way; but it is a list, yes.

Q. It has some very important factors?

A. It's actually – There's a citation on the next page of who prepared this, and it's just sort of a decision tree for releasing primarily psychiatric patients not pedophiles. But I thought it was helpful.

Q. But, in other words, you wouldn't have taught this to people if you thought it was garbage, would you?

A. I don't think it's garbage. I think they're good issues.

Q. Let's start then. Good. The first thing you said was, [p. 484] if you want to analyze the risk of the patients, number one, did admission symptoms relate to violence or threats of violence. And that's important, isn't it?

A. Sure.

Q. Then you have, number two, does the patient have a history of violent behavior; and it says if you check "yes" go to number three, right?

A. Right.

Q. Okay. Then you go to three, and it says, "Does the patient have a history of arrests or violence before age fifteen?" If "yes", patient's already in a high-risk group, it says, does it not?

A. Right?

Q. Says go on to number 4. Is that correct?

A. Right.

Q. Then when you got to number 4, it says, "Have the patients admitting symptoms been adequately treated?"

A. That's correct.

Q. And it says, "If 'yes', go on to question number 5"?

A. Well, no, it doesn't. It says "Stop here." It says, "He can't be released."

Q. It says if the answer is 'yes' –

A. Yes, go on to 5, yes, that's correct.

Q. If 'no', what to what do you do?

A. Don't release them.

Q. Number 5, let's go on, Doctor; and it says under number [p. 485] 5, "Is the patient likely to stay on medications or other treatment?" And you said "If the answer to this is 'yes', then you should go on to the next question." Is that correct?

A. Right.

MR. WEILERT: Your Honor, I object. At this point I think Dr. Logan said this list was made to be used with people who were going in for psychiatric care and treatment, not for a pedophile; and I don't think it's relevant at this point.

THE COURT: Could you clarify that point, Mrs. Foulston.

BY MS. FOULSTON:

Q. Dr. Logan, is this information the type analysis that one goes through in determining risk?

A. With certain groups of patients, yes, there are a number of other things there that are risk factors with pedophiles more specific to that diagnosis that would be much more refined than that.

Q. But this would be an overview, would it not?

A. Some of the things here don't really itf [sic] pedophiles really well. This whole thing about medications. Some people treat pedophiles with medications but in general many programs do not and don't even require that. This would be something very relevant for a person about schizophrenia, for [p. 486] example.

Q. Let's back up to number 4. It says, "If the patient's admitting symptoms have been adequately treated" – if you have a pedophile who's never been treated, would that be a concern?

A. Sure.

Q. All right. And would that fall into number 4? "Have patients admitting symptoms been adequately treated?"

A. You would have to say that they haven't been addresssed [sic].

Q. That's right. So if that's the case, the patient shouldn't be released. Is that correct?

A. Well, certainly not from a psychiatric facility, if that's your goal to treat them, sure.

Q. Thank you. On number 5, let's eliminate the use of the word "medications."

A. Okay.

Q. And just say "Is the person likely to stay on other treatment?" And in having that in mind, it says, "If, yes go on to question 6." Would you agree, doctor, that if the answer is no and if you knew the patient was not motivated to treatment and had a track record of refusing

treatment and failing to go to treatment and just quite frankly didn't want treatment, would you then agree that the patient should not be released?

MR. WEILERT: Your Honor, I object once again. [p. 487] I think Dr. Logan said these don't really apply to pedophilia. It's a situation where we're talking about somebody going into a psychiatric hospital or being released from a psychiatric hospital. That's not in issue.

THE COURT: Well, the doctor can couch his answer in those terms, Mr. Weilert. He can make it clear for you.

BY MS. FOULSTON:

Q. As this would relate to pedophiliacs?

A. Well, certainly if a pedophile is in for treatment from a program or hospital, if the man isn't likely to continue followup, I'm not going to recommend his release from the program. But if I'm giving a criteria asking to predict more likely than not that this guy is going to re-offend, I can't say. I know if he didn't come to my treatment facility at all, just walked out to the community, have a less than 50 percent chance of re-offending. So you're dealing with a clinical decision here versus a prediction kind of decision. The two are different.

Q. Do you use common sense at all in your practice?

A. I sure try to.

Q. Okay. Let's just use a little common sense, then.

A. Okay.

Q. Dr. Logan, if you had an untreated pedophile who had offended repeatedly for thirty-eight years, would you have [p. 488] him babysit your children?

MR. WEILERT: Objection, Your Honor. That's irrelevant. The question is, in the wording of the statute, whether he is likely to re-offend. Dr. Logan has answered that question.

THE COURT: Well, I'll sustain the question based upon the form of the question. Would you rephrase the question.

MS. FOULSTON: Sure I will.

BY MS. FOULSTON:

Q. Dr. Logan, do you believe that an untreated pedophile who's committed acts for thirty-eight years is safe to be with small children?

MR. WEILERT: Objection, Your Honor. It's irrelevant. The question is whether or not he is likely to commit an offense in the future.

THE COURT: I'll overrule at this time.

A. If his chance of molesting that kid is 30 percent, that's too high for me personally.

BY MS. FOULSTON:

Q. Thank you. Doctor, you have indicated, I believe, in discussion that pedophilia is a crime of opportunity. Is that correct?

A. Many times, yes.

Q. Given the opportunity, a pedophile will perform the act. [p. 489] Is that correct?

A. Depends on some other variables, like whether he's been treated or not, what his motivation – how afraid he is of re-incarceration, a number of factors that modify that; but he may be tempted to.

MS. FOULSTON: Thank you. I have nothing further.

THE COURT: Redirect.

MR. WEILERT: Thank you, Your Honor.

FURTHER REDIRECT EXAMINATION

BY MR. WEILERT:

Q. Doctor, the document that Ms. Foulston was talking to you about, what was the purpose for your putting together that document?

A. Basically to train residents who are often in their first years of dealing with psychiatric patients, many of them, in fact, being at Topeka State Hospital, some issues to think about in terms of making release decisions about the patients, primarily schizophrenics that are in the hospital.

Q. Are you talking primarily about people who release decisions about people who have been committed for treatment or the act for commitment of people who are mentally ill?

A. Yes, exactly. That's the whole focus of this seminar is to help them with these kind of issues.

Q. Let's talk about that for a a little bit. First of all, [p. 490] what is the standard to be used for admitting someone for treatment under that act?

MS. FOULSTON: Your Honor, I object to the relevancy on that issue. There's a motion in limine.

THE COURT: I'm going to have to sustain the objection as far as this doctor testifying about admission for treatment under an act. If I misunderstood your question –

MR. WEILERT: Your Honor, Ms. Foulston has asked questions about the treatment decisions listed in this act – or pardon me – in this document prepared by Dr. Logan. My question to him is aimed at determining whether or not the treatment decision and admission decisions and release decisions that he's addressing in this document have anything at all to do with the statute that we're dealing with in this lawsuit.

MS. FOULSTON: Your Honor, may we approach the bench?

THE COURT: Yes, please approach.

(The following proceedings were had at the bench, outside the hearing of the jury.

MS. FOULSTON: This document was given to me by Dr. Logan specifically in request to his testimony regarding prediction of dangerousness, and that's what he [p. 491] gave me.

MR. WEILERT: And that was what she requested. It doesn't say anywhere in it in regard to a prediction of whether or not he's likely to re-offend.

THE COURT: Well, the problem I have, I think you're asking this doctor to make some kind of legal interpretation as to whether or not this says "the act." I'm going to sustain the objection, but that question is being asked. I want you to rephrase the question.

MR. WEILERT: I will. I will simply ask his understanding of the standards for admission. Would that be all right?

MS. FOULSTON: Isn't there a motion in limine?

THE COURT: Are you talking about the regular care and treatment?

MR. WEILERT: Care and treatment.

THE COURT: Well, we're not dealing with that act. I would rather you would ask in regards to predictability. The problem is I don't want your witness to get into any legal conclusion. So please put the question to him without a legal conclusion.

MR. WEILERT: I will certainly try.

THE COURT: Okay.

(At this point proceedings continued in the hearing of the jury.)

[p. 492] BY MR. WEILERT:

Q. Now, Dr. Logan, in preparing the document Ms. Foulston was asking you about, that is dealing with treatment recommendations, is it not, for mentally-ill people?

A. Right.

Q. And in the context of an admission decision for a mentally-ill person, what are you looking for?

A. Very recent evidence of the propensity to harm themselves, someone else; inability to take care of their own self needs. And you also are now required to make a decision about whether they're competent to make informed decisions about whether they enter the hospital or not.

Q. And when you say "very recent behavior", what do you mean by that?

A. Looking at the last week to ten days, sometimes shorter than that.

Q. And when you talk about whether – the list that Ms. Foulston started going through – whether the admissions symptoms relate to violence or threat of violence, you are talking about whether in the last week or ten days somebody's hurt somebody or threatened to hurt somebody, aren't you?

A. No. Actually, that list is more geared toward release decisions after somebody has already come into the hospital. Then you're looking at the question of when is it appropriate to let them go.

[p. 493] Q. But it's a release decision about someone who came in because of immediately preceding behavior, is it not?

MS. FOULSTON: Objection to the cross examination by the witness as opposed to his direct examination on his witness.

THE COURT: All right. Your objection leading form of the questions.

MR. WEILERT: I forgot which side I was on.

THE COURT: Leading question objection will be sustained.

BY MR. WEILERT:

Q. Okay. Now, when you say that the list that you started going through with Ms. Foulston deals with a release decision, under what circumstances are the person that you are talking about releasing – What circumstances were they admitted under?

A. Most often for some act of violence combined with their inability to make a competent decision about whether to go into the hospital.

Q. Okay. And all of the factors that Ms. Foulston went into are addressed to a release decision of such a person, are they not?

A. Yes.

Q. That is, she asked you whether or not you ever assessed risks and make predictions in cases? Do you remember that?

[p. 494] A. Yes, I do.

Q. And you said "yes"?

A. I do.

Q. Can you tell us in what types of cases you make those assessments and predictions?

A. All kinds of cases. But very frequently I'm asked by state hospital personnel to consult on a case when they're thinking about releasing somebody and they wonder if it would be safe to do so. That happens at both

the Larned State Hospital and Osawatomie State Hospital. And particularly I'm asked to do that on patients because I work a great deal of those kinds of individuals and might be aware of some risk factors. Occasionally asked to do that when the individual may also have a sex offense in the background, and I have been asked very many times how close the place was he was going to live to the nearest grade school. And I find out sometimes it's across the street. So I have to make decisions about whether somebody would be amenable to treatment, a program at Menninger incest diverson program. So you do have to make clinical decisions based on the information you have about whether somebody is an acceptable risk to engage in a program or engage in release.

Q. You talked or you've mentioned like the location of the school. Are you familiar at all with the release procedures that the Kansas Parole Board uses?

[p. 495] MS. FOULSTON: Your Honor, I object. It's all outside the scope of direct examination.

THE COURT: Well, it is sustained. It is outside the scope.

BY MR. WEILERT:

Q. In your experience, sir, is there a difference between making a clinical decision and making a prediction as set forth in the statute we're dealing with?

MS. FOULSTON: Your Honor, I object to the form of the question, 'cause I don't understand it.

THE COURT: Well, that's not a good basis for the objection but –

MS. FOULSTON: It's the best one I've got, Your Honor.

THE COURT: At this time, Mr. Weilert, I will ask you to rephrase the question.

MS. HARTMAN, JUROR: Please do.

BY MR. WEILERT:

Q. In regards to predictability – And don't couch it in terms of the statute. I'll make the legal determinations. You said that you have to make these clinical decisions, and I assume you do that on a regular basis, don't you?

A. Sure.

Q. Is there a requirement in the field of psychiatry or psychology that a clinical decision is based upon a more than [p. 496] 50 percent probability of something happening?

A. No, absolutely not. What you, in fact, do is – It's sort of like the babysitting question that Ms. Foulston asked me a minute ago. It's one thing to predict if this guy comes over to my house, he's going to molest my kids on this particular day; another thing to let him babysit on a routine basis when there is a three out of ten chance that he would molest the kids over the next month or next year. Seven out of ten guys with his history wouldn't do it. But you are not going to expose your kids to a 30 percent risk. That's a different issue than saying, "I'm going to tell you that I'm a betting man; I'll bet that this guy will actually molest these kids." I can't predict that. The fact I would lose 70 percent of the time, it is not gonna be worth it to me.

MR. WEILERT: I don't have anything else, Your Honor.

THE COURT: Any further cross?

MS. FOULSTON: Nothing. Thank you. Thank you, Dr. Logan.

THE COURT: Thank you, Doctor. May this doctor be excused?

MR. WEILERT: Yes, sir. Thank you.

THE COURT: All right, sir. You are excused. Respondent may call his next witness.

MR. WEILERT: Respondent will rest, Your

* * *

[p. 528] please bring the jury in.

(The jury returns to the courtroom.)

THE COURT: Good afternoon, ladies and gentlemen. As I understand it, you have arrived at a verdict.

I see, Mr. Lukens, that you are carrying something. Does that mean you are the foreman of the jury?

MR. LUKENS: That's correct, Your Honor.

THE COURT: Do you have a verdict, sir?

MR. LUKENS: Yes, sir, we do.

THE COURT: Would you please deliver the verdict to Mrs. Soper.

MS. SOPER: Thank you.

THE COURT: Very well. I will ask Mrs. Soper at this time to read the jury's verdict into the record.

MS. SOPER: "We, the jury, make the following answer to the question submitted by the Court. Number 1, is the respondent Leroy Hendricks a sexually violent predator? The answer is yes." This is dated today, the 6th day of October, signed by Robert Lukens, presiding juror.

THE COURT: Ladies and gentlemen of the jury, I will now do what is called polling the jury. What this basically means is I will read his your names and ask you one the question, and that is, "Is this your verdict?" If this is your verdict, you simply have to answer yes. If it is

* * *

JURY INSTRUCTIONS ON SEXUAL PREDATORS - AND MENTAL ABNORMALITIES (10/6/94)

INSTRUCTION NO. 6

To find that the respondent, Leroy Hendricks, is a sexually violent predator, each of the following elements must be proved beyond a reasonable doubt:

(1) That respondent has been convicted of a crime of sexual violence;

(2) That respondent suffers from a mental abnormality; and,

(3) That such mental abnormality makes respondent likely to engage in predatory acts of sexual violence.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict that the respondent is a sexually violent predator.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one or more of these elements, then it will be your duty to return a verdict that the respondent is not a sexually violent predator.

INSTRUCTION NO. 7

"Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

VERDICT (10/6/94)

IN THE DISTRICT COURT OF
SEDGWICK COUNTY, KANSAS
PROBATE DEPARTMENT
DIVISION 5

IN THE MATTER OF THE CARE AND TREATMENT OF LEROY HENDRICKS, Respondent.	Case No. 94 P 964

VERDICT

(Filed Oct. 7, 1994)

We, the Jury, make the following answer to the questions submitted by the Court:

1. Is the respondent, Leroy Hendricks, a sexually violent predator?

12 Yes 0 No

Dated this 6 day of October, 1994.

/s/ Robert A. Perkins
Presiding Juror

JOURNAL ENTRY OF COMMITMENT (10/6/94)

jc
NOLA FOULSTON, #09175
District Attorney
Eighteenth Judicial District
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525 N. Main
Wichita, KS 67203
316/383-7713

IN THE EIGHTEENTH JUDICIAL DISTRICT

DISTRICT COURT, SEDGWICK COUNTY, KANSAS

PROBATE DEPARTMENT

IN THE MATTER OF THE CARE AND TREATMENT OF **LEROY HENDRICKS,** Respondent.	)	Case No. 94 P 964

PURSUANT TO Kansas Statutes Annotated 59-29(a)01 *et seq.* (Ch. 316 1994 Legislative Session) An Act concerning persons who commit sexually violent offenses.

JOURNAL ENTRY OF COMMITMENT
OF SEXUALLY VIOLENT PREDATOR

(Filed Oct. 21, 1994)

NOW ON THIS 3rd day of October, 1994 this matter comes on for jury trial before The Honorable Gregory L. Waller, Judge of the District Court, within forty-five (45) days of the filing of the Petition alleging respondent to be a sexually violent predator as defined by law; and after

evaluation of respondent at Larned State Hospital as previously ordered herein. Petitioner, State of Kansas, appears by its attorneys, Nola Foulston, District Attorney and Debra L. Barnett, Assistant District Attorney. Respondent appears in person and by his court appointed attorney, Thomas J. Weilert.

Thereupon, a jury is duly impaneled and sworn and evidence is presented from court day to court day until both sides rest.

The following witnesses were sworn and testified on behalf of petitioner:

Rose Loux
Roger Morris
LeRoy Hendricks
Stella Carter
Ron Davenport
Lester Lee
Mary Chambers
Dr. Charles Befort

The following witness was sworn and testified on behalf of respondent:

Dr. William Logan

THEREUPON, the Jury, having received the evidence, the instructions of the Court, and the arguments of counsel, and having duly deliberated, on the 6th day of October, 19914 [sic], by unanimous verdict finds beyond a reasonable doubt that respondent is a sexually violent predator as defined by law and returns the following verdict in open Court:

We, the Jury, impaneled and sworn in the above entitled case, do upon our oath find the respondent, Leroy Hendricks:

X Is a sexually violent predator

_ Is not a sexually violent predator

Date of this verdict October 6, 1994.

Presiding Juror /s/ Signed by Presiding Juror

Thereupon, the Court accepted the unanimous verdict of the jury and continues this case for further proceedings.

Thereafter, on the 20th day of October, 1994, this case comes on for further hearing. Petitioner, State of Kansas, appears by its attorney, Debra L. Barnett, Assistant District Attorney. Respondent appears in person and by his attorney, Thomas J. Weilert.

WHEREUPON respondent presents argument in support of his motion to dismiss or in the alternative motion for a new trial.

WHEREUPON, the Court, after hearing the statements and arguments of counsel, after having reviewed the file and being fully advised in the premises overrules such motions.

WHEREUPON, the Court, after being fully and duly advised in the premises finds, orders, adjudges and decrees that respondent is a sexually violent predator as defined by Kansas Statutes Annotated 59-29(a)01 et. seq. (Ch. 316 1994 Legislative Session – Violent Sexual Predator Act) and further pursuant to such enactment that respondent should be committed to the custody of the

Secretary of Social and Rehabilitations Services for control, care and treatment until such time as respondent's mental abnormality or personality disorder has so changed that respondent is safe to be at large.

IT IS THE FURTHER ORDER OF THE COURT that such treatment shall be provided at a facility operated by the Department of Social and Rehabilitation Services, and that at all times, respondent shall be kept in a secure facility segregated from any other patient under the supervision of the Department of Social and Rehabilitation Services.

IT IS FURTHER ORDERED that the Clerk of this Court deliver two (2) certified copies of this judgment and commitment to the Sheriff of Sedgwick County, Kansas, or one of his duly authorized deputies. It is further ordered that such certified copies serve as the commitment of the defendant and make due return thereof and that said Sheriff or authorized deputy is ordered to transport the defendant, forthwith, to Larned State Hospital, under the custody of Kansas Department of Social and Rehabilitation Services, to begin treatment.

The Secretary of Social and Rehabilitation Services shall report to the Court as required by the provisions of Kansas Statutes Annotated 59-29(a)01 *et seq.* (Ch. 316 1994 Legislative Session).

IT IS SO ORDERED.

/s/ Gregory L. Waller
GREGORY L. WALLER,
JUDGE

APPROVED BY:

/s/ Nola Foulston
NOLA FOULSTON, #09175
District Attorney

/s/ Debra L. Barnett
DEBRA L. BARNETT, #12729
Assistant District Attorney

/s/ Thomas J. Weilert
THOMAS J. WEILERT, #08626
Attorney for Defendant

**MOTION FOR NEW TRIAL,
TESTIMONY OF JOHN HOUSE
(TRANSCRIPT OF PROCEEDINGS OF
OCTOBER 20, 1994)**

* * *

[p. 6] your discretion.

MR. WEILERT: Then I think I would like to ask Mr. House to step forward and be sworn.

JOHN HOUSE,

called as a witness on behalf of the Respondent, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WEILERT:

Q. Just so we can be – would you tell us your name and your occupation, sir?

A. John House, an attorney with the Kansas Department of Social and Rehabilitation Services.

Q. And in that position with the SRS, sir, are you familiar with attempts to hire a contractor to provide care and treatment under the provisions of the state sexual predator law?

A. Somewhat.

Q. And you were in court, I believe, before Judge – or in a session before Judge Barbara wherein the State presented evidence that they were very close to filing a – or, pardon me, signing a contract with either DECCA or

Prison Health Systems to provide that care and treatment, were you not?

A. I was present in the courtroom. I did not testify at that time.

[p. 7] Q. But you heard those assertions made by the State, did you not?

A. I heard at the time that the Department was negotiating with two bidders in their proposal to contract out those services.

Q. And are you aware whether or not any contract was ever signed by either of those two bidders?

A. No contract has been signed with either of those two bidders.

Q. Is it correct that at this time there is not a professional staff assembled to provide any specialized training to those persons committed to SRS custody under the provisions of the Sexual Predator Act?

A. I would not say that. There is professional staff at Larned State Hospital to be available, and arrangements have been made for them to provide professional services as necessary.

Q. And who is that professional staff?

A. The – I mean, depending on what kind of professional staff you're talking about, you have physician services, nursing services, psychology services, social work services, activity therapy services, so on and so forth, the whole range of professional services available at Larned State Hospital.

Q. Is it correct, though, sir, that those services are those [p. 8] which are available to mentally ill persons in general?

A. Well, we provide care and treatment for persons who are mentally ill at Larned State Hospital. Also provide alcohol and drug abuse treatment services, and so on. There is a range of services available there.

Q. Larned State Hospital does not have a program specifically designed to treat sexually violent predators, does it?

A. The Department has assembled a program to provide that kind of care and treatment. It is currently located at Larned State Hospital. I don't know whether I would call that Larned State Hospital or not. I mean, it is a separate program and under separate administration, but it will right now be housed on the grounds of Topeka – or, excuse me, Larned State Hospital and will borrow from that facility.

Q. Are you aware of any of the persons who you say would provide that care, whether they have any specialized training in the provision of treatment to persons committed for being sexually violent predators?

A. I'm not sure I could follow the entire question. Staff have been hired specifically who would provide immediate care.

Q. By that, you mean people who simply – you know, staff to make sure that there are – there is a bed made, that there are meals given, there's exercise, there's showers [p. 9] and hygiene care, that type of thing, aren't you?

A. Certainly that and the implementation of any treatment program which professional staff might set out.

Q. Okay. Now, the professional staff, there's no one specifically hired to operate the sexually violent predator treatment program, is there?

A. No one specifically hired under that program at this time.

Q. Okay. And there is no clinical director for that program, is there?

A. Not at this time.

Q. There is no psychiatrist or psychologist specifically hired to staff that program, is there?

A. Not specifically hired to staff that program at this time.

Q. As far as you're aware, there's no one in the psychiatric or psychological professions that are available for treatment – who have any special expertise in the treatment of sexually violent predators, is there?

A. There's certainly staff there who has had experience in treating sexual dysfunctions of various kinds, including pedophilia, which I think is basically –

Q. I don't think that answered my question, though, sir.

A. I don't – there are professional staff at Larned State Hospital that would be available in the interim, while staff specifically dedicated to this program are hired, that would be able, I think, to provide substantial [p. 10] services.

Q. Okay. But the staff that is there right now, they're the same staff that provides treatment to other mentally ill patients at Larned State Hospital, aren't they?

A. Professional staff?

Q. Yes, sir.

A. Yes.

Q. And there is really nothing different about the treatment that they can offer Mr. Hendricks than there is what they offer to the other people at Larned State Hospital, is there?

A. I don't know that I can answer that. I'm not a clinician, so I don't know what kind of professional services they would be able to provide.

Q. Is it the intention of the Department of Social and Rehabilitation Services to hire professional staff specifically to treat people committed under the Sexually Violent Predator Act?

A. Yes.

Q. Is it correct that some of the – or at least one of the reasons why SRS decided to operate this program internally was because the contractors that were being negotiated with could not provide that staff?

MS. BARNETT: I'm going to object to that, Your Honor, lack of foundation, being outside the personal [p. 11] knowledge of this specific witness, and calling for hearsay.

THE COURT: Well, I'll sustain unless we can establish foundation that he does have this knowledge.

BY MR. WEILERT:

Q. Okay. Do you have any knowledge concerning some of the problems that arose during the negotiations regarding hiring a contractor?

A. No, I don't know why the bids weren't accepted.

Q. But you do know that none were?

A. That's correct.

Q. So would a correct summary be that there's no professional staff specifically hired for the sexually violent predator program; there's no clinical director; there is no staff, other than the same that provides other treatment to mentally ill persons; is all that correct?

MS. BARNETT: Objection, compound question, leading.

THE COURT: I'll sustain it.

BY MR. WEILERT:

Q. I think you've already testified to all that before, haven't you?

A. Well, again, I mean, we have hired specifically dedicated direct care staff. We're in the process of hiring specifically dedicated professional staff. Specifically [p. 12] dedicated professional staff has not been hired, expect it will be shortly.

Q. Well, you heard the – I think at the time he testified – and his first name is Terry. I can't think of his last name.

A. Mr. Davis.

Q. Mr. Davis indicated that – to the Court back in early September that the contractor would be named. In fact, he thought perhaps there had already been a contract signed. Do you remember that testimony, sir?

MS. BARNETT: I'm going to object, Your Honor, as to calling for an answer based on hearsay.

MR. WEILERT: He was there in the courtroom and heard it, Your Honor.

THE COURT: Well, I'll overrule the objection.

THE WITNESS: I did hear that bids were being reviewed and it was his hope that a contract could be shortly signed.

BY MR. WEILERT:

Q. And nothing has been signed now, and we're a month and a half later?

A. That's correct.

MR. WEILERT: I believe that's all. Thank you, sir.

THE COURT: Ms. Barnett, do you desire any [p. 13] cross?

MS. BARNETT: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. BARNETT:

Q. Mr. House, there isn't anyone at Larned right now, is there, who has been designated a sexually violent predator?

A. No.

Q. In fact, if Mr. Hendricks is committed to Larned or to the custody of the Secretary of Corrections, he'll be the first one committed under this act; isn't that correct?

A. To the Secretary of Social and Rehabilitation Services, that's correct.

Q. I am sorry.

A. No, there's no one else in the state been committed to the Secretary's custody yet.

Q. Would there be any point in, let's just say, getting a sexually violent predator program up and going for no one?

A. We have made plans with the expectation one would happen, and we've taken steps to implement that, but, you're right, there's a limit to how much you can do until you actually have someone to treat.

Q. Well, you can't treat somebody that's not there; isn't that correct?

A. That's correct.

[p. 14] Q. Now, you've indicated that, despite Mr. Weilert's questions of you, you don't have anyone specifically designated. You do have professional staff at Larned; isn't that correct?

A. That's correct.

Q. Larned has nurses; isn't that correct?

A. That's correct.

Q. Larned has physicians; isn't that correct?

A. Correct.

Q. Larned has psychologists?

A. Correct.

Q. Larned has psychiatrists?

A. That's correct.

Q. In fact, one of the psychologists there is a Dr. Befort; isn't that correct?

A. That's correct.

Q. And do you know from your own personal knowledge whether Dr. Befort has extensive background in dealing with sex offenders?

A. No. I'm not terribly familiar with his background. I do know that he did the evaluation in the particular case.

Q. All right. Now, with regard to this designation that we're giving of sexually violent predators, you are an attorney, aren't you?

A. That's correct.

[p. 15] Q. Have you heard of Chapter 316, which is the Sexually Violent Predator Act?

A. I have.

Q. The phrase "sexually violent predator," is something that the legislature has coined; isn't that correct?

A. That's correct.

Q. To your knowledge, that's not a title given to a mental illness or a diagnosis of a mental illness, is it?

A. Again, I'm not a clinician; but, to the extent that I'm familiar with it, no, I'm not aware that that's a commonly understood clinical term.

Q. I believe you had indicated during your direct with Mr. Weilert that you understood that some of these diagnoses given for sex offenders or sexually violent predators might be in the area of pedophilia; would that be correct?

A. That's correct.

Q. Would it surprise you if I indicated Mr. Hendricks, who we are talking about in this case, he's been diagnosed as a pedophile?

A. That's what I understand.

Q. Is it your understanding that Larned currently and in the past has dealt with individuals who have been diagnosed as pedophiles?

A. That's correct.

Q. And that they have provided mental health care and [p. 16] treatment to those individuals?

A. Correct.

Q. All right. Would it be fair to say that, to the best of your knowledge, mental health care and treatment is mental health care and treatment?

A. Yes.

Q. Okay. You have to look at the specific need of the individual; isn't that correct?

A. That's correct.

Q. And part of that is based on doing an evaluation and then looking at what type of treatment program you can give to that individual?

A. Correct.

Q. Certainly we wouldn't want to just have some form program that we plug people into, would we?

A. All the care and treatment out there is based on individualized treatment plans that are prepared for each individual person as they're admitted, and then the treatment follows up on that individual as planned.

Q. And to the best of your knowledge, that wouldn't be any different for Mr. Hendricks, will it?

A. No.

Q. Even though he's been designated as a sexually violent predator?

A. No. He would go through at least an initial stage, [p. 17] evaluation and then the development of an individualized treatment plan.

Q. Whatever his needs are, Larned will try to meet those needs, won't they?

A. That's correct.

Q. I don't know exactly where Mr. Hendricks is going to wind up, but let's just say that he winds up at Larned, and let's say he winds up there tomorrow. To the best of your knowledge, will Larned begin, immediately upon his arrival at their facility, the evaluation process in

trying to determine what his needs are and dealing with these needs?

A. In a rough sort of sense, correct. I mean space is available, staff is available. There will be a certain period of time in which he kind of settles in and staff get to know him and he gets to know staff. That would all be part of an evaluation process.

Q. And with regard to that staff, you're talking about professional staff, aren't you?

A. Both direct care and professional staff.

Q. And by professional staff, maybe to be a little bit more specific for the record, we're talking about psychologists and psychiatrists and physicians, aren't we?

A. Social workers and therapists of different sorts, yes.

Q. People who would begin the process of identifying his needs and dealing with them; isn't that correct?

[p. 18] A. That's correct.

Q. Is it possible that the people who are going to ultimately be designated – and, for the record, I'm making quote kind of marks with my hands – who are designated as the sexually violent predator people, is it possible that those people will come from within Larned?

A. I suppose that's possible, certainly, if someone already at Larned State Hospital has applied for the position and was hired.

Q. And indicates an interest in working specifically in that area?

A. That's a possibility.

MS. BARNETT: Thank you very much, Mr. House. I have no further questions at this time, Your Honor.

THE COURT: Any further questions, Mr. Weilert?

MR. WEILERT: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. WEILERT:

Q. Mr. House, if I understand your testimony, you're saying that Larned State Hospital has staff that has treated persons with, for lack of a better term, sexual dysfunctions for some period of time, right?

A. Yes.

Q. And that those are the same people who, at least at this stage, would be treating Mr. Hendricks?

[p. 19] A. Well, I mean, not exactly corresponding. There's a number of other elements someone has to meet to be committed under the Sexual Predator Act.

Q. But if he goes out there tomorrow, those same people will be providing treatment; is that right?

A. That's correct.

Q. And as far as you're aware, they would be using the same treatment modalities that they've used from their previous experience, right?

A. Again, I'm not a clinician. I don't know exactly what kind of treatment modalities they would use.

Q. Well, if they've used treatment or if they have treated pedophiles before, you don't have any reason to believe they would change their treatment modality, do you?

MS. BARNETT: I'm going to object to that. The witness has already answered that he doesn't know.

THE COURT: I'll sustain the objection. It's outside his scope of knowledge.

BY MR. WEILERT:

Q. Okay. But so far as you're aware, there are no plans to change that treatment modality, are there?

MS. BARNETT: Same objection, Your Honor.

THE COURT: Well, I'll overrule that. He can answer if he knows.

THE WITNESS: I don't personally know of what [p. 20] the treatment plans are.

BY MR. WEILERT:

Q. Okay. When you talk about there being space available that has Mr. Hendricks separated from everybody, doesn't it?

A. That's correct.

Q. And when you talk about some of the treatment programs that have been going on out at Larned for a long time dealing with pedophilia, are you familiar whether or not those include group treatment or group treatment sessions?

A. I'm not specifically familiar, no. I assume so, but I don't specifically know.

MR. WEILERT: Okay. I don't have anything else. Thank you.

THE COURT: Anything further, Ms. Barnett?

MS. BARNETT: No, Your Honor.

THE COURT: All right, sir, you may step down.

MR. WEILERT: In continuation, Your Honor, it appears that the state does not have a treatment program specifically designed, which the statute requires, to be for the treatment of sexually violent predators. What they have are people who have done treating of mentally ill people in Larned State Hospital for some period of time, and that it is certainly logical to assume that, since they are not specifically hired to operate the [p. 21] sexually violent predator treatment program, they're going to be using the same treatment systems and modalities that they've used for years and which the legislature has specifically said are not treatment modalities which are acceptable to the legislature in a case such as Mr. Hendricks' So we don't have – pardon me, the state does not have the specialized treatment program, the specialized treatment modalities envisioned by the legislature in place. You know, they hope to have some soon, and we've already seen what "hoping" and "soon" mean in dealing – in terms of having a treatment program available. Back on September 6th, they hoped to have a contractor engaging in this – pardon me, set to engage in this treatment soon. Now they don't have a contractor, they don't have a program, and there's no indication at

what point in time such a program director or clinical director, a specialized treatment team is going to be available.

And, Your Honor, to incarcerate someone with the hope that at some point in the future there's going to be a suitable treatment program is simply not acceptable. In reality, what it amounts to is an indefinite incarceration based upon conduct which does not constitute a new criminal offense, and for that reason, it is criminal in nature; it is not for care and treatment, since the [p. 22] special modality of training and treatment is not available. And that was the sole justifying reasons for Judge Barbara's finding that this was a civil statute rather than a criminal one. Because that justification is no longer in existence and is not in existence, the statute is obviously criminal. It violates the Constitutional provisions for double jeopardy ex post facto. It violates substantive and procedural due process, and Mr. Hendricks should be discharged.

In addition to the other arguments set forth briefly in the motion, the only other one I want to spend any time on is – and this isn't in the motion, but it kind of came up yesterday. I was sitting in my office yesterday afternoon and was informed by a reporter for the – I think it was KFDI – that the county commission had summarily denied payment of the bill for fees and expenses that I had submitted kind of unintentionally, but that had been submitted in any event. What that does, Your Honor, I understand the county's position is they're saying that the legislature has mandated that these proceedings be had; that persons subjected to them will be represented by counsel or appointed counsel, and they shall be

allowed funds for experts and a couple of other things. And the county took the position that, since the state didn't provide any funding, we aren't going to pay the bill.

[p. 23] Well, it's pretty obviously an irresponsible act by the legislature to pass this type of legislation without any provision for funding the obvious expenses that are going to arise out of it. But that is, unfortunately, not uncommon for our legislature. But in a very real sense, the action by the legislature, in combination with that of the county commission, violates the provision of the statute which says that Mr. Hendricks will be – or people similarly situated will be appointed counsel.

Your Honor, I always hesitate to speak for other members of the bar, but I think Your Honor is somewhat aware of the amount of time involved in representing someone on one of those cases, on the amount of disruption it can have on a person's practice and on the very real economic needs of a lawyer to be paid for his or her services. It cannot help but have a rather chilling effect upon the willingness of members of the bar to represent people similarly situated if they are faced with the prospect of not getting paid or, at the very best, having to go to the appellate courts of the State of Kansas to get some direction on whether they're going to be paid for their services. In reality, what the legislature has granted with one hand, the right to appointed counsel, the county is trying to take away with the other by saying, We're not going to pay the bill. And [p. 24] there's no way to submit a bill to the Board for – to – Board for Indigents' Defense Fund because this, according to the legislature and Judge Barbara's ruling, is a civil matter and not a criminal. So

even though the statutory scheme may provide for counsel, the reality of the situation is that, if counsel is not going to be paid, the likelihood of finding persons willing to accept appointments is very, very remote. And for that reason, we feel the combination of the state legislature not funding the provisions of the statute and the county commission denying payment combine to deny Mr. Hendricks and others so situated a – their statutory, if not Constitutional, right for effective assistance of counsel. And we feel that the appellate process, which is also still to come and for which the same provisions are made for appointment of counsel, indicate that Mr. Hendricks is going to be denied that assistance and, therefore, he should be discharged. Thank you.

THE COURT: Thank you. Ms. Barnett, do you care to respond?

MS. BARNETT: Yes, Your Honor. Well, Mr. Weilert talks a lot about the legislative intent and the legislative ideas for a different treatment modality, but I think that what we really need to do is focus on what the law says because that most accurately reflects what [p. 25] the legislature intends. And if you look at Chapter 316, Section 1, you'll find the following statements, and I quote: "The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto. . . . " And I'll end my quote there.

This piece of legislation doesn't say that for sexually violent predators who are sex offenders that you need to develop some special treatment program for them or whatever else. That may be determined by the professionals at some point in time. It may be already determined by them now. But I think what we're doing here is we're comparing apples with oranges. Sex offenders suffer from personality disorders and mental illness. They are the same types of personality disorders and mental illness the professionals have been dealing with for a long, long time. In this piece of legislation, the legislature has said that there are certain sex offenders who, because of their personality disorders and mental abnormalities, are so dangerous and so predatory that they [p. 26] need to be in a secure facility and they need to receive long term care and treatment, and they need treatment modalities that are very different from the treatment modalities for people who suffer from other mental illnesses. I don't think it takes a rocket scientist to figure out that if you hear voices that tell to you do things that you need to be treated a little bit differently than somebody who likes to have sex with children, like Mr. Hendricks. You're going to need different treatment than Mr. Hendricks does, especially in view of the fact Mr. Hendricks doesn't think he has a problem and he won't avail himself of the needed counseling and therapy that has been offered to him in the past.

This piece of legislation is going to be implemented and begin with Mr. Hendricks. He is the first case, the first individual who will be committed to the Department of SRS, and they will begin his evaluation process and treatment as soon as he arrives at their facility.

No, they don't have a clinical director who is called the Clinical Director for Sexually Violent Predators, but they don't need one. His treatment needs are going to be met, and as they learn about him and evaluate him and develop a rapport with him, they will continue to change and monitor and evaluate the program [p. 27] and treatment they are offering him. And that is the way that it should be. To suggest somehow that there is some formula here that we ought to plug him into like everybody else and treat him that way, I think, completely denies what the legislature wanted. They wanted an individual treatment program for these people, and that's exactly how he's going to be treated and dealt with, and there's nothing inappropriate or wrong about that.

I think this is an example of getting the cart before the horse. How can SRS set up a program for people who aren't in the program or who don't exist? You have to have people to treat before you can engage in treatment. And that's what we're talking about here. And they will begin his treatment as soon as he arrives and everything gets evaluated and settled the way it should be.

I believe that Mr. Weilert's stated it correctly when he indicated that the issues raised in his motion to dismiss have already been dealt with in great length during the trial process of this case, so I would just ask the Court to uphold the prior Court's findings on all of these issues.

With regard to the final point raised about the legislature being irresponsible and enacting this piece of legislation and not funding it, what I would argue is that it's an irrelevant response for us to put a price tag on [p. 28] the welfare of our children. We're talking about money

here, and that's something that can be taken up with the county commission and dealt with in another instance. The defendant or the respondent in this case was not denied the right to good representation. He had a good attorney who represented him very well throughout this process, even though, as of today, he has not received any money for that representation. This man, Mr. Hendricks, has not been denied his right to representation, and that's the only issue properly before the Court. Whether or not somebody else on down the road may be denied the right to representation is a matter for that Court on that day at that time. But talking in the abstract about what may or may not happen in the future has no bearing on this present case. Mr. Hendricks got representation. He got very good representation, and he has not had his due process rights or any other Constitutional rights denied by the fact that his attorney has not yet received money from the county or anyone else with regard to this case.

So I would ask the Court to deny the respondent's motion to dismiss or in the alternative a motion for new trial. And with regard to the claim of failure to pay or anything of that nature, I believe that it's already been discussed about having another hearing on that matter so that we could notice up the county attorney in this matter [p. 29] so that he could be here to represent the county commission, if there's any further discussion about bills or payment of these.

THE COURT: It is the position of the Court that the matters raised by the defendant in the motion to dismiss or in the alternative a motion for new trial – I say the defendant. I meant respondent. I believe those matters were properly handled and dealt with by this Court

and other courts. I feel that the arguments of the defendant in regards to there not being a treatment program available are not sufficient because I believe that the Secretary of Social and Rehabilitation Services has established a treatment program. That program will be available perhaps at some time in the future. But when it becomes apparent that that program is not a viable program, something can be done. On that basis alone, I would overrule the motion for new trial and/or to dismiss.

In regard to the matter of the payment, as Ms. Barnett pointed out, Mr. Hendricks has received very competent and able representation. But I'm going to request, Mr. Weilert, that you do notice the county counselor's office, who will have a hearing in regards to this matter about payment of these. Advise me when we can schedule that, and I will calendar it.

I had previously found that Mr. Hendricks, by reason [p. 30] of the verdict of the jury on October 6, is a sexual predator, and I have previously committed him to the custody of the Secretary of Social and Rehabilitation Services for treatment. That order stands, and the defendant should be transported to Larned State Hospital to begin that treatment as soon as possible.

Court will be in recess.

MR. WEILERT: Your Honor, there were just two kinds of housekeeping things. First of all, as far as when Mr. Hendricks is transported to Larned, the last time he went out there, he was allowed to take his personal property and personal papers and cigarettes with him, and I assume that order would still remain in effect.

THE COURT: It would.

MR. WEILERT: Okay. And, secondly, I've discussed with Ms. Barnett in the court file in this matter, during pretrial stages there were various documents, some of which were faxed to Judge Barbara, some of which were filed by Ms. Shaneyfelt, some by Mr. Greeno, some by myself. We agreed to get together at some point next week to go through just to make sure that the record is correct and that everything that was – should have been in the file is, in fact, in the file. And, if necessary, would the Court approve an order or sign an order approved by Ms. Barnett and myself that any document

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**STATE HABEAS CORPUS PROCEEDING
UNDER KAN. STAT. ANN. 60-1501
(TRANSCRIPT OF PROCEEDINGS
OF AUGUST 28, 1995)**

[p. 5] MR. WEILERT: Your Honor, I don't believe they're as specific as is required by the code of civil procedure, but they do have a general denial.

THE COURT: And they're verified.

MR. WEILERT: Yes.

THE COURT: Are you ready to proceed?

MR. WEILERT: Yes, Your Honor.

THE COURT: You may proceed.

MR. WEILERT: Thank you, Your Honor. We would call Charles Befort.

CHARLES BEFORT,

called as a witness in behalf of the Petitioners, being of legal age and after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WEILERT:

Q. Would you tell us your name and occupation please, sir?

A. My name is Charles Befort; I'm chief psychologist at Larned State Hospital.

Q. And Dr. Befort, we've met a few times before, haven't we?

A. Yes, we have.

Q. I'd like to go back to the period of time before we first met, say to about July of 1994, can you tell [p. 6] us what your occupation was at that time?

A. Same occupation.

Q. Okay. And as I recall, you were the chief psychologist and that included work at both the Larned State Hospital and the State Security Hospital?

A. That's right.

Q. And this once again we're talking about approximately July of 1994, those were or that was a full-time position, was it not?

A. Yes.

Q. And did you have any difficulty at all in filling up your 40 or 50 or 60 hours a week?

A. Not at all.

Q. Can you tell us something about your educational background, sir?

A. I have a doctor of philosophy degree in psychology from Oklahoma State University.

Q. And you have been a licensed psychologist for how long, sir?

A. Since about 1971.

Q. And it's my understanding that you did not have any type of internship or fellowship in the treatment of sexual offenders, is that right?

A. That's right.

[p. 7] Q. And your employment since obtaining your PhD has been at Larned State Hospital, has it not?

A. Yes. And I also work in a mental health center one day a week.

Q. You told me where that was and I don't remember.

A. Greensburg.

Q. The Iroquois Center I believe?

A. That's right.

Q. Now, before July of 1994 then, would it be correct to say that you did not have any specialized advanced training in the treatment of sex offenders?

A. That's correct.

Q. In, I believe it was September of 1994, I along with some other lawyers took your deposition in Mr. Hendricks' case and the case of Richard Beam, is that right?

A. That's right.

Q. And that was at the district attorney's office in Wichita?

A. Yes.

Q. Now, during the course of that deposition you testified that in your opinion you were not qualified to be a director of a sexual treatment program, is that right?

A. I can't remember, but that's probably what I would [p. 8] testify to.

Q. So here today you feel that you're not qualified to be a director of a sexual treatment program?

A. I am more qualified than I was a year ago, yes.

Q. Okay. The fact remains though that in your personal opinion, you don't, still don't think you're qualified, do you?

A. Not fully.

Q. Now, in, I believe in that same deposition and at times later, you have given some information as to what you felt a sexual treatment program ought to contain, is that correct?

A. I gave that in a deposition a couple of weeks ago.

Q. Okay.

A. That what you're referring to?

Q. That plus I think some others but we'll stick with the one a couple of weeks ago. That was August 16th in Wichita, wasn't it?

A. Yes.

Q. And that was in the case of State of Kansas versus Jack Spratt?

A. Yes.

Q. And in that deposition you talked about the fact that there were no clinical people giving any treatment to the persons confined in the sexual [p. 9] treatment program at the Larned mental health facility, is that right?

A. Except for me, yes.

Q. Now, in your position as of August 16th of 1995, just a couple weeks ago, you, I believe, said that the offender or pardon me, the people in the sexual treatment program were receiving essentially no treatment; do you recall saying that?

A. Yes.

Q. And that's a true statement, is it not?

A. I believe so.

Q. Are you familiar with a sexual predator treatment program composition which it's my understanding was prepared by Janet McClellan and for the sexual treatment program at Larned?

A. It's been sometime ago, I remember putting it together, yes.

Q. Did you assist in putting that together?

A. Not a great deal, mostly looked it over, checked it for internal consistency and also just to educate myself as to what was in there.

Q. Okay. Who put that treatment program proposal together?

A. I think Ms. McClellan did most of that.

Q. Would it be fair to say that the treatment program [p. 10] in your opinion as a psychologist should include persons who have an expertise in the psychological and psychiatric fields?

A. Yes.

Q. And would it be your opinion that the director of that program should have expertise in those areas?

A. Not necessarily.

Q. Should there be a, if the director of the program does not have that expertise, should the person in charge of the actual clinical department have that expertise?

A. Yes.

Q. And you've testified that you feel you do not have that expertise, is that correct?

A. Not entirely, that's right.

Q. Now Ms. McClellan, do you know anything about her educational background?

A. Some.

Q. She has degrees, I believe in relating to business and law enforcement, does she not?

A. Yes.

Q. Doesn't have any training in psychology or psychiatry, does she?

A. Not that I know of.

Q. The document that we just spoke of, the sexual [p. 11] predator treatment program composition, it lists several items that are in bold face required characteristics. One of the required characteristics, number three, is that the program must have adequate staffing in terms of numbers, quantifications and gender representation. Now the sexual treatment program at Larned doesn't have that, does it?

A. Not at this time.

Q. The fourth one is it says that the program must have adequate funding, not only for the necessary and required staff, but for materials, equipment, staff training, resident treatment and education, and for adequate space to carry out its assigned tasks. The program at Larned doesn't have that, does it?

A. I think it has all that. It has plenty of funding and we have lots of space.

Q. You don't have the materials and equipment that you would consider necessary in a sexual treatment program though, do you?

A. I think we have most of it, not all of it.

Q. What don't you have?

A. I don't know if we have the plethysmograph lab in place, I don't know if we have the equipment yet. We're going to have a polygraph lab and I believe [p. 12] we're still waiting for that. We do have plenty of testing materials and books and videotapes and so forth and we can get whatever we need.

Q. So you have some of that but not all of it?

A. Quite a bit.

Q. In, I believe it was October of 1994, Mr. Hendricks was admitted to the sexual treatment program, is that correct?

A. That's probably right.

Q. And at the time Mr. Hendricks was admitted, actually before that time, you had done an evaluation of Mr. Hendricks, haven't you?

A. Yes.

Q. And you testified at his commitment hearing?

A. Yes.

Q. And at least to a significant degree, your testimony is what resulted in him being committed, isn't that correct?

A. I assume that.

Q. You were the only psychologist who testified on behalf of the state that offered any opinion as to Mr. Hendricks, whether or not he was a sexual predator as defined by the statute?

A. As I recall, that's correct.

Q. You recognize, do you not, sir, that that creates a [p. 13] significant barrier for you being an effective treatment giver?

A. Yes.

Q. And that's a widely recognized premise in the psychological and psychiatric fields, isn't it?

A. I believe so.

Q. And up until this time you're the only psychologist or psychiatrist that Mr. Hendricks has had any contact with, aren't you? In the sexual treatment program?

A. That's correct.

Q. For the reasons you just stated, would you agree that it would be extremely difficult, if not impossible, for you to give effective treatment to Mr. Hendricks?

A. I assume that, with respect to certain issues, yes.

Q. In fact, those are the, for lack of a better term, the sexual issues that cause him to be here, right?

A. Sexual deviant, yes.

Q. I didn't have a chance to go through a lot of them, but in whatever that big blue book is, it's kind of a history of Mr. Hendricks since he arrived in Larned back in October of '94, for the first several months of that history, your name appears very sporadically, and is that because you saw Mr. [p. 14] Hendricks very sporadically?

A. That's true.

Q. And that was because you were involved with your other full-time job, right?

A. Right. At that point I was simply consulting psychologist for SRS.

Q. And then at what point did you become the, I believe you're the acting clinical director, is that right?

A. Temporary acting clinical director something, anyway since March the 20th.

Q. And since March the 20th then, pardon me, before March the 20th, did Mr. Hendricks receive any treatment dealing with the sexual deviancy issues that brought him here?

A. Probably a little provided by Mr. Wright.

Q. And who is Mr. Wright?

A. Mr. Wright's a person with a psychology degree who used to be on staff and he saw Mr. Hendricks in individual sessions.

Q. Was that a bachelor's degree in psychology?

A. Master's degree.

Q. Master's degree? And who was supervising him?

A. As a consulting psychologist, he did connect with me quite a bit. We didn't spend a lot of time going over those specifics, though, he just took it from [p. 15] there, flew by the seat of his pants.

Q. Now correct me if I am wrong, but isn't the law in the State of Kansas regarding master's level psychologist is that they are required to work under the direction of a PhD level psychologist?

A. He wasn't functioning as a psychologist formally.

Q. What was he functioning as?

A. A forensic counselor or forensic specialist, some title.

Q. So something below a master's level psychologist and something below a licensed clinical social worker?

A. Yes.

Q. How long was Mr. Wright on staff?

A. He was one of the first folks on staff, in the summer or early fall, and I believe he left employment in March this year. That's my best recollection.

Q. Okay. So other than whatever contact you had with Mr. Wright, that was the only treatment he got up until March of '95.

A. Basically in terms of counseling, right.

Q. I notice there are some references in Mr. Hendricks' record to some group sessions, notations that you have made?

A. Yes.

[p. 16] Q. Now am I correct, sir, that those group sessions are not dealing with sexual deviancy issues at this point?

A. A few times it may have come up, depending upon what the men wanted to discuss. But for the most part, no.

Q. They're primarily dealing, for lack of a better term, kind of a group session about the fact that there aren't any treatment programs in place, isn't that correct?

A. That has been a gripe, yes.

Q. It's been a consistent gripe throughout your period as acting clinical director, hasn't it?

A. Pretty well.

Q. And basically your response during those sessions has been something along the lines of we're working on it, we're trying to get something in place, that type of thing?

A. Yes.

Q. Now, Mr. Hendricks has been here for about ten months now, right?

A. Yes.

Q. You have had occasion to read the sexual predator law on more than one occasion I'm sure?

A. Yes.

[p. 17] Q. And you know that it requires an annual report to the court?

A. Yes.

Q. Who's going to prepare that report for Mr. Hendricks in October?

A. I don't know. I assume I will.

Q. Now, in making that report, you're going to have to tell the court that he has had no opportunity for meaningful treatment, aren't you?

A. Yes.

Q. And in making a report of that type, you are effectively denying Leroy any possible chance for release in October of 1995, aren't you?

A. In terms of following the statute, the requirement that he's no longer dangerous or likely to engage in such behavior, yes, that hasn't been modified and it certainly hasn't been dealt with in treatment.

Q. And the reason it hasn't been dealt with in treatment is beca[illegible] the sexual treatment program at Larned Correctional [illegible]ntal Health Facility basically doesn't exist outside of you, isn't that correct?

A. In terms of the addressing the sexual deviance, that's essentially correct.

Q. You recognize Mr. Blumenshine?

A. Yes.

[p. 18] Q. And Mr. Blumenshine came to the treatment center in April, I believe, March or April. As far as the type of treatment available to him it would being the same as what you testified about Mr. Hendricks' wouldn't it?

A. Yes, except I don't think Mr. Wright had a chance to work with him. I think he was either gone or leaving.

Q. And in regard to Mr. Hay, your answers would be the same regarding the treatment provided to him?

A. Yes.

MR. WEILERT: I don't have anything else at this time. Thank you, sir.

THE COURT: Thank you. Cross-examine.

MS. HAGERMAN: Your Honor, we have a series of questions for Dr. Befort that would go way beyond the scope of what they asked. We can bring those up now or wait until further examination.

THE COURT: Well, the statute says I'm to hear this matter in a summary fashion. I suppose that that means we're not bound by the technical rules of trial.

MR. WEILERT: We certainly have no objection so long as we're allowed to cross-examine.

THE COURT: Proceed.

[p. 19] CROSS EXAMINATION

BY MS. HAGERMAN:

Q. Dr. Befort, how long have you been an employee with State Security Hospital or Larned State Hospital?

A. Over 28 years.

Q. And throughout those 28 years have you had the occasion to participate in what I would call forensic evaluations and reports to the court?

A. Yes.-

Q. And have many of those reports dealt with people who have either been charged or convicted of sexual offenses?

A. Yes.

Q. Do you have an estimate of how many sexual offenders you may have at least in some way participated in there [sic] evaluation or treatment?

A. I'm certain many dozens, maybe a hundred, maybe two hundred over those years.

Q. So when you were asked to fill in as the acting clinical director, or the temporary acting clinical director, whatever your title is, was it with some understanding that you had years of working with people who have sexual offenses in their background?

A. Yes, from an evaluation point of view.

Q. And primarily until you took this temporary [p. 20] assignment was that primarily your job with the State of Kansas was preparing forensic reports?

A. It was one of the bigger portions, but I'm also chief psychologist, so a lot of administrative duties. And in the course of the work I would also be involved with patients that weren't forensic patients, adolescents being an example.

Q. Just so the court and counsel have some idea of how you've been spending your time, did you say March is when you were asked to take –

A. March 20th.

Q. March 20th, could you just kind of run through what do you do for their program what do you do for State Security Hospital?

A. Since then I've been trying to at least make a physical appearance on the unit most days that I'm on duty at Larned State Hospital. I began a group, I don't know when I began it, March or April I would guess, I try to do that twice a week. Sometimes I don't make it because of other pressing duties. That usually takes a couple of hours by the time I get over there, get the group running and record my notes. Additionally, from the very beginning it was presumed that the clinical director, once we get one aboard, will also be doing the predator evaluations 21 that I'm doing now, plus of course, the ongoing evaluations, the evaluations for treatment and then the annual evaluations and so forth. So in the absence of a clinical director I've been doing those, even though physically I do those on State Security Hospital, but technically those are duties that are the same as the clinical director will be doing.

Q. And as far as preparing the sexual predator evaluations is that a quite timely and time consuming job at this point?

A. Very. Very time consuming.

Q. Approximately how many hours would you spend on each case?

A. There have been some I've probably spent at least 30 hours on. I've had one case maybe as few as a dozen. Most of them run I'd say around 20 hours or more.

Q. And then do you often go to court and testify as an expert for the state?

A. I've gone several times, yes.

Q. Does that include depositions as well?

A. Yes.

Q. Is it fair to say that that particular function of this clinical director's job is taking up the [p. 22] greatest majority of your time?

A. I'd say it's taking over half of it for sure, maybe more.

Q. And are you personally familiar with the three petitioners in this matter?

A. Yes.

Q. And I think it was touched on, but you actually did their sexual predator evaluations?

A. Yes.

Q. And you're familiar with their sexual history and the crimes that I guess ultimately led to their current placement?

A. Yes.

Q. Dr. Befort, I'll hand you what's been marked as Respondent's Exhibit E and ask you to identify that please?

A. There is a cover letter and part of my report on Mr. Leroy Hendricks.

Q. And is that your report, your professional opinion as to whether Mr. Hendricks was a sexual predator?

A. The part that's here, yes.

Q. And your conclusion?

MR. WEILERT: Objection, Your Honor, this is irrelevant. There's not a question that Mr. Hendricks was committed back in October. It's [p. 23] irrelevant as to whether he is receiving any treatment at this point.

MS. HAGERMAN: Your Honor, we can move on, we simply want to make sure it's a matter of record. We can move on.

THE COURT: I deem the question withdrawn.

Q. Dr. Befort, how would you summarize the treatment Mr. Hendricks is receiving?

A. My goodness, I don't know where to start. Mr. Hendricks was the first resident that we had, and when he came aboard we were operating out of a closet almost, over on Young Building of Larned, State Security Hospital. At that point in time we had a few staff members to

take care of the day-to-day care and so forth, and Mr. Wright of course, was trying to provide some counseling. So not a lot was being done when he first came. That lasted quite a while till the second resident came. Then a third. And then we were too crowded to exist in that closet anymore. So we moved to the Larned Correctional Mental Health Facility where rooms were provided for them as well as a three room treatment area and care area. That's not counting the day hall. So that was a vast improvement over the situation. At the end of February, I believe, Ms. [p. 24] McClellan came on as a program director. And at that point things picked up rapidly in terms of program development. Since then we've now moved to a, what I call a pod, which gives us even more room for the residents, and for additional residents, should there be any. It also provides more area for staff that are starting to come aboard and will be coming aboard with respect to their office areas and treatment areas. So those are getting in and are essentially basically in place. There has been a great deal of training that has occurred for the staff and fortunately for me too. A real good start in teaching the staff there about the nature of sexual offenders, sexual deviancy and so forth. I've started a group which I talked about before, and that continues. Ideally twice a week. Once in a while I don't make it, but usually twice a week. I think that's about where we're at. I think we're ready to really explode in terms of getting a good program in place.

Q. And Dr. Befort, you and I guess kind of from a psychiatric perspective, and the ward milieu is a term used frequently in a psychiatric hospital, what does that mean exactly?

A. Basically ward milieu means that the environment, [p. 25] the atmosphere, what goes on in terms of interpersonal interaction is of hopefully a therapeutic or positive effect on the residents or patients as is the case in the hospital.

Q. Does that term apply to this particular unit as well?

A. I think so.

Q. And why?

A. In the staff have had enough, staff that are on board have had enough training to the point that they have some understanding about the dynamics of individuals who have sexual deviancies. They know a little bit about confronting, about cognitive distortions and things of that sort. So they interact with the residents on a, they have a knowledge base which hopefully is beneficial to the residents.

Q. Is that a form of treatment?

A. I would say so.

Q. Dr. Befort, were you through with your answer on that, is that correct, a form of treatment?

A. Yes, it is a form of treatment in my opinion.

Q. And is that form of treatment going on currently at the sexual predator treatment?

A. Yes.

[p. 26] Q. Dr. Befort, has Mr. Hendricks admitted he's a sexual predator in need of treatment?

A. Officially, I hope I get this right, he has signed a document saying that he's a sexual offender and is willing to do, willing to engage in treatment. The reason I hesitate is I have talked to Mr. Hendricks about that matter on different occasions too.

Q. I'll hand you what has been marked as Respondent's DD and ask you to identify that?

A. This is a form, the top label is SPTP for sexual predator treatment program, assessment and evaluation request slash refusal. And then it says sexual predator treatment program, treatment declaration. Mr. Hendricks was presented with this document and asked to choose an option listed there and to sign it. The option he chose was I have a problem of sexual deviancy and want to be involved in treatment. Signed by him on May 3rd, and witnessed by me that same date. I did note that he hesitated about signing this without contacting his attorney. But went ahead and signed it anyway saying it was under duress, but it didn't seem to be a big problem for him.

Q. Has Mr. Hendricks participated in the treatment in the groups that you have been running?

[p. 27] A. Yes.

Q. Does he actively participate?

A. Usually, yes.

Q. Are you familiar with the second petitioner in this matter, Paul Blumenshine?

A. Yes, I am.

Q. Did you also do a sexual predator evaluation of Mr. Blumenshine?

A. An evaluation, yes. Oh, yes, the original evaluation, yes.

Q. I'll hand you what's been marked as Respondent's Exhibit F and ask you to identify that please?

A. Yes, that's the cover letter and my report on Mr. Blumenshine.

Q. And your conclusion was he was a sexual predator?

A. Yes.

Q. And if I were to ask you the same series of questions what type of treatment is Mr. Blumenshine receiving on the unit, would your answer be similar as to what you just gave for Mr. Hendricks?

A. Yes.

Q. Does he participate in the groups that you are running at this time?

A. Yes, he does.

Q. Has he acknowledged that he needs treatment?

[p. 28] A. I believe his attitude is no, not really, but I'll go along.

Q. I'll hand you Respondent's EE and ask you to identify that please?

A. Same form as I described with Mr. Hendricks. The option he checked was I do not have a problem of

sexual deviancy and I do not want treatment. And he signed that as long as we added a parenthetical statement, which is but I will attend the classes. I wrote that for Mr. Blumenshine as he is illiterate.

Q. And Mr. Blumenshine is participating in group?

A. Yes.

Q. Are you familiar with the third petitioner in this matter, Kenneth Hay?

A. Yes, I am.

Q. Did you also do a sexual predator evaluation and report to court on him?

A. Yes, I did.

Q. Hand you Respondent's G and ask you to identify that?

A. That is a cover letter and evaluation report I wrote.

Q. It's to the Johnson County District Court?

A. Yes.

[p. 29] Q. And it was your opinion he was a sexual predator?

A. Yes.

Q. Have you also been working with Mr. Hay within the program under the sexual predator treatment act?

A. Yes.

Q. If I asked you the same questions regarding Mr. Hendricks regarding the treatment available to the unit would your answers be the same?

A. Yes.

Q. Has he indicated a desire for treatment?

A. Yes, he has.

Q. I'll hand you Respondent's Exhibit FF, and ask you to identify that?

A. Once again that's the same form we've been referring to in the last two cases. He chose option I have a problem of sexual deviancy and want to be involved in treatment. Signed by him on May 16th and by me as witness that same date.

Q. Has he been an active participant in the groups that you've had available on the unit?

A. Yes.

Q. Dr. Befort, I think it was alluded to briefly on your direct examination as to what would be your opinion of what a state-of-the-art sexual offender program should contain. Can you tell us what do you [p. 30] believe it should contain?

A. Okay. It's my understanding that the underpinning of a state-of-the-art program for sexual offenders, treatment program, is the group process. In other words, group sessions, group meetings are essential. And the topics and issues covered in the group process are many and varied. Some of them directly related to the sexual deviancy issues, others related to things that append to

that, such as dealing with emotional issues, dealing with psychological issues and so on, and even daily living issues. So a lot of time would be used in the state-of-the-art program by offering group sessions of that sort. Attached would also be individual counseling, individual therapy. Probably again addressing all of those same issues but on an individual basis and then maybe additional issues that might relate more to psychotherapy factors as an example. Extremely important in a state-of-the-art program also is the assessment component, talking about assessment done prior to treatment and that assessment would have a lot to do with the type of treatment offered, the intensity of treatment, that type of thing. The assessment is ongoing also to see how the individual's [p. 31] progressing. And then there are usually assessments at regular intervals in order to assess progress or lack thereof. Then the very, in terms of stuff, a plethysmograph laboratory and polygraph laboratory are also considered state-of-the-art assessment tools.

Q. Would leisure time activities such as activity therapy classes, would that be part of a program?

A. Certainly.

MR. WEILERT: I'm sorry, I didn't hear the question.

Q. Leisure time activities?

A. Yeah, activity therapy includes leisure time but it's also used to help develop skills that they might be interested in developing in terms of hands on, whether it's a hobby, whether it's a skill of some sort. Certainly

you can't spend, you know, 24 hours a day doing intensive group and individual work. There's got to be time off for things that are hopefully useful.

Q. How about educational components?

A. That would be included under what I was grouping as group process. Yes, educational modules, teaching, that would usually be in a class setting or group setting.

[p. 32] Q. Dr. Befort, where does the current program fall within this continuum of what you believe a program should contain, state-of-the-art program?

A. Where it is at right now?

Q. Uh-huh.

A. It has very little of that.

Q. Where's it going?

A. Oh, I think –

MR. WEILERT: Your Honor, I object to where it's going, it's not relevant.

THE COURT: Overruled.

THE WITNESS: Based on my observations over the last few months, the foundation for an excellent program is laid, and as I said before, it's about ready to start up full steam.

Q. And why is that, Dr. Befort?

A. Well, it just takes awhile to get things in place. It takes awhile just to get staff interviewed and hired following the state system. And some of these folks are hard

to find anyway. But quite a few have been found now and some have come aboard and some are scheduled to come aboard. So I think we're ready to start bolstering our treatment aspect.

Q. Dr. Befort, you're familiar with State Security Hospital, would the program have been in a different [p. 33] stage if it had been possible to use like a wing of State Security Hospital and place the sexual predator treatment program on?

MR. WEILERT: I'm sorry, I can't hear the question.

THE COURT: Let's take a real short recess and I'll see if we can find somebody that knows how to turn the mike on.

(A brief recess was taken, after which the following.)

Q. I think my last question, Dr. Befort, you're familiar with State Security Hospital?

A. Yes.

Q. And you're familiar with the different wings, there are four different wings?

A. Four different wings on Dillon units.

Q. Would the program have been different today had it been possible to place the sexual predator unit on one of those wings?

A. I think so.

Q. Why wasn't that possible?

A. Because a lot of things we're getting in place were already in place there, a place to have the program,

there are some clinicians there, all the support things are there, all the things needed for care in [p. 34] everyday activities are already there. The program would not have had to start from scratch.

Q. And this program literally did start from scratch?

A. Yes.

MS. HAGERMAN: That's all I have, Your Honor.

THE COURT: Anything else for this witness?

MR. WEILERT: Yes, Your Honor, thank you.

REDIRECT EXAMINATION

BY MR. WEILERT:

Q. Dr. Befort, once again you've read the sexual predator statute many times, and you're familiar with what I term the preamble to that act, are you not?

A. I'm sure I am.

Q. Okay. Let's –

A. I haven't got it memorized though.

Q. You don't have it memorized, okay, that's now number 59-29(a)01?

A. Right.

Q. This preamble to the sexually violent predator act states that the treatment to be given to these people is different than that which is available in other mental

health facilities, does it not? Not in those exact words but that's the general theme?

A. It means that it's a mental illness treatment [p. 35] techniques won't do strictly speaking for these folks.

Q. Okay. And this discussion you had with the state's counsel regarding the, I hope I say it right, ward milieu?

A. Ward milieu.

Q. Milieu, that type of treatment is available in community health centers, private hospitals, state mental health facilities, state hospitals, all of those, isn't it?

A. Most of them, yes.

Q. So that's not the specialized different modality type of treatment that's referred to in the sex predator act, is it?

A. When I was asked that question about the milieu on the sex predator program, there will be some aspects of it that are unique to the sex predator treatment program. Some of those are in place. But a lot of them are the same in terms of interacting with staff and that type of stuff.

Q. But as far as the – this is my new book and I don't have it marked up like my old one – but as far as treatment modalities that are referred to, that ward milieu in and of itself isn't a treatment modality, is it?

[p. 36] A. Well, it's a treatment modality, it's a matter of the strength.

Q. Okay. Would it be fair to say, Doctor, that the sexual, pardon me, the treatment for sexual deviancy issues that can be given through this ward milieu –

A. Excellent.

Q. – is extremely small portion of the treatment that you would foresee?

A. Right. If all they got was milieu therapy, they wouldn't get better.

Q. And –

A. Or wouldn't get well enough.

Q. And so as far as that being enough to justify a person's commitment to receive only that type of treatment, that wouldn't be right, would it?

A. I don't know if this would be my area of expertise.

Q. Okay. If you were the acting director, you are the acting director of the clinical –

A. Clinical director.

Q. If in that position you felt all you could give was this ward milieu treatment, you would feel that totally inadequate for the purpose of the statute, wouldn't you?

A. That's right.

Q. You testified that all three of these gentlemen have [p. 37] to at least some extent indicated their willingness to participate in treatment?

A. Yes.

Q. So your program, the program development is not being hampered say like the one in Washington state that was just found unconstitutional because of lack of treatment by, or pardon me, lack of participation by the inmates, that hasn't been a problem?

A. These residents have participated, yes.

Q. Now, specifically in regard to Mr. Hay, do you recall doing an evaluation back in June of 1993 on Mr. Hay? He was sent there, or pardon me, sent to Larned State Security Hospital for an evaluation?

A. What year was that?

Q. 1993.

A. I'm aware that an evaluation was done then, I'm not sure if I participated, I can't remember.

Q. I'm going to show you what's marked as Petitioner's Exhibit Number 1, and ask if you can identify that document, sir? Your signature is on the last page.

A. Yes. This is a cover letter as well as a report labeled forensic staff conference summary. And the purpose, and that's an evaluation report, and specifically in this case it's an evaluation that's called a pre-sentence evaluation.

[p. 38] Q. Wasn't it in fact, weren't you asked to determine whether a person should be sent to Larned State Security Hospital for treatment or to the Secretary of Corrections?

A. There are more options than that, but we're trying to give the court some idea about the individual's

mental state, problem areas. And we make recommendations whether it be probation, hospitalization, imprisonment, that's what we do.

Q. In your cross-examination you said that there were facilities and staff on line at the Dillon portion of the State Security Hospital?

A. Yes.

Q. That could have offered sexual predator treatment at an earlier stage in these proceedings?

A. Yes. It would not have been ready to go, but a lot of things would have been in place to build on that weren't here for the current program.

Q. So you would agree back in 1993 there was not a facility available for the type of sexual predator treatment that you would foresee?

A. On Dillon building?

Q. Yes.

A. There was not and is not.

Q. In talking about this program that you would foresee [p. 39] as a sexual predator treatment program, you said that first of all, you'd need group processes. I've seen some documentation that sets out group sessions as often as five or six times a day for an hour, hour and a half apiece, is that the type of group sessions you foresee?

A. Sessions and they could be group, would be a mixture of group and individual, yes, but very intense, very comprehensive.

Q. So you think approximately then six times six is 36 hours of treatment, group treatment per week would be appropriate?

A. Treatment and that could be individual or educational.

Q. But either in a group or individual therapy?

A. Yes, you have to have several hours a day, right.

Q. And the reason for that is that if you do things maybe for an hour or maybe two per week you don't really address the issues that need to be addressed, isn't that right?

A. Well, you can, it's just going to take forever.

Q. And your understanding of the treatment program is to prepare the people committed to it to return to society if possible, right?

A. Yes.

[p. 40] Q. And that's to be done expeditiously?

A. Yes.

Q. And to take a serious approach to doing that?

A. Yes.

Q. And up to now there hasn't been a real serious approach to doing that, has there, as far as the treatment actually delivered?

A. In terms of the needed treatment relevant to the sexual deviancy, that hasn't been delivered yet.

Q. So in his quest to be released from this program, Mr. Hendricks has wasted ten months, hasn't he?

A. In terms of treatment effects, yes.

Q. And he has not been responsible for that waste because he's said he's willing to participate, isn't that correct?

A. That's right.

Q. The only reason he and these other gentlemen have not gotten the treatment that is prescribed by statute is because it's not been available, isn't that right?

A. That's right.

Q. And to this very day it's not available, is it?

A. Today it's still not available.

MR. WEILERT: Nothing further, thank you.

MS. HAGERMAN: Nothing more of this witness,

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[p. 43] MR. HOUSE: We are.

MS. ORRICK: Your Honor, may I approach and borrow that Petitioner's 1 exhibit please.

MR. HOUSE: Call Janet McClellan.

THE COURT: Come forward and be sworn.

JANET MCCLELLAN,

called as a witness in behalf of the Respondent, being of legal age and after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOUSE:

Q. State your name for the record please.

A. It's Janet McClellan.

Q. And where employed?

A. At the SPT unit.

Q. SPT?

A. Sexual predator treatment unit.

Q. Where's that located at?

A. It's housed currently at the Larned Correctional Mental Health Facility.

Q. You're employed by what department?

A. SRS and have been since February of this year.

Q. Okay. Why don't you just give us a little bit about your background, your experience and your educational experiences?

[p. 44] A. I have, I began my career or careers as a law enforcement officer. I spent eight years as a law enforcement officer in a number of states, state of Kansas, Washington, Wyoming and Ohio. I spent nine years as a college professor, eight of those were Park College in Parkville, Missouri, and one year as a visiting faculty member with Washburn University in the criminal justice department there. For seven years I was a corrections manager with the Kansas Department of Corrections, entered there as the director of education, vocational

programs for inmates throughout the state. Also over these seven years I was the compact administrator for parole services, the director of training for corrections and parole personnel for the department of corrections and my last position was as a aide-de-camp to the secretary of field services and community corrections with the Department of Corrections. And again since February 20 of this year with SRS as the program director for the sexual predator treatment unit.

Q. Okay. Would you just tell me real briefly in a gross kind of sense what program director means, what your job is in relation to this program?

A. I'm sorry, I forgot in answering a portion of the [p. 45] question, I received my bachelor's degree from Park College, mid to late seventies. My master's degree is in public administration from the University of Dayton, in Dayton, Ohio, and I took an additional 66 hours of doctoral level training with the University of Kansas in their political science program, emphasis in policy analysis, criminal justice and public administration.

Q. Okay. Back to your position as program director, tell me what that is.

A. Well, the program director's position was designed with SRS is responsible for the development of the and clinical direction of the sexual predator treatment program. Also the overall administrative development, this would involve purchasing of equipment, supplies, hiring of staff, the advertisement of same such issues, all the detail from essentially paper clips to evaluation of the overall operation of the program, the personnel within.

Q. You would be largely responsible for the administration of the program?

A. Yes.

Q. Not necessarily the clinical delivery of treatment?

A. No, not the delivery of treatment.

[p. 46] Q. Okay. Why, you know, did you seek out this job?

A. Yes, I did.

Q. Why your interest in this type of a program?

A. As I've indicated a moment ago I began my career in law enforcement. I was an undercover narcotics agent with the KBI for sometime: Then I went on to the State of Washington where I had an opportunity at that time because I fit, essentially fit the physical description of the young ladies that Ted Bundy was killing.

MS. ORRICK: Your Honor, I object. Clearly this has no relevancy in this matter. We can see where this is going. This is not, has nothing to do with her adequacy to be a program director which is what she's here to testify for today.

THE COURT: Well, we can go into her qualifications briefly, let's don't spend the whole morning.

Q. Yeah, got to be brief.

A. I'm sorry.

Q. Your interest in this type of a program obviously interested in whether, you know, you wanted to do this or you had to do this?

A. Right. Essentially the types of experiences that I've had over the years and the minimum [p. 47] qualifications and the extended qualifications for the position of the program director was advertised by SRS and to come to, quite frankly, to come to central Kansas as well enticed me, so I applied.

Q. Who was it that actually hired you?

A. I was hired by the commissioner in February, who was George Vega of mental health, and mental retardation services with SRS.

Q. When you arrived here in Larned at the sex predators treatment program, what did you find?

A. It had, as Dr. Befort stated earlier, it had just moved from the Young Building on the campus of the hospital over to the Larned Correctional Facility several days before I arrived. I arrived on February 20th, I believe that was a Monday. And then I took over the administration management of the program at that time. And it was, we were provided space by the Larned Correctional Facility administration, an office for myself, the offices, an office for the staff, as well as activity day room, day-time rooms for the residents who were assigned there. And of course, they were, had their rooms in the pod wing.

Q. Mr. Hendricks was there at the time?

A. Mr. Hendricks was there, Mr. Blumenshine was there, [p. 48] Mr. Hay had not arrived.

Q. Let me show you what's been marked as Respondent's, looks like Q and R. Can you identify those?

A. Yes.

Q. Tell me what they are.

A. Exhibit Q is the administrative organizational chart as of February 20, 1995, when I arrived in Larned. It shows that Janet Schalansky was the acting secretary of SRS, Mr. George Vega being the commissioner of mental health retardation. The director of mental health was vacant at that time. I was the [sic] then program director. A Mr. Terry Davis was still initially assigned temporarily the SRS director of quality and review and field services and he had several contacts at that time. I believe he was the SRS representative who would come back and forth to the unit prior to my arrival. And then Dr. Befort is there as a consultant. Mr. to bin [sic] Wright was forensic therapist assigned to the unit and there are I believe ten psychiatric security specialist [sic] who were on the unit at that time.

Q. Does that describe kind of the staff pattern that existed at the time you arrived?

A. Yes, it does.

[p. 49] Q. Positions available, okay. And Exhibit R?

A. Exhibit R is a memorandum letter that I sent to Mr. Vega expressing a, well just overview in terms of the type of treatment process programing [sic] that I thought was important. I wanted to give him an overview and essentially it's a review distillation of readings, research, search for documentation that I'd been conducting at that time in terms of programing. And the types of elements that affect the people in the field, the experts in the field

saying should be parts and pieces of the consideration of the development of the unit.

Q. Is it fair to say it's kind of a first report back to your boss commissioner on what you found and where you thought the program ought to be headed?

A. Yes.

Q. Why don't you tell us what you did from there?

A. Well, from this particular, these, as you indicated, these are beginning documents, and from this as a result of the feedback I received from both my supervisors, I was also in contact with Dr. Thomas Lock, out of Lawrence, Dr. Freeman Longo, the Vermont consortium which is known as the Safer Society, various and sundry other state agencies and various and sundry other states in terms of this [p. 50] programing. Now Kansas was the first, I'm sorry, the second state to initiate this particular program. So we were having to start from the floor in a sense in terms of developing of the programs. And from that what I did was to continue on pulling those particular materials together, gathering, borrowing, assisting with input from the individuals that I've just mentioned to deal and more fully developed program with its attached elements needs and regards to the way in which the unit should operate as well as the way in which staff and residents would interact and the types of personnel. Since that point in time, that being the original organizational chart, I have, I have hired the rest of the staff, so to speak. I still have two positions at this time that remain open. One of them is an office assistant 3, the other is of course, as has been pointed out, the clinical director which is being advertised and the rest of the positions

that were available at that time have been filled. And those individuals are on board as of the 11th of next month. In terms of pulling the program together, I have ordered all the materials, the instrumentalities, the plethysmograph, instrumentality has arrived, contract requests have [p. 51] been let for polygraph, other sorts of research assessment, instrumentalities, training materials, devices for the residents, as well as the staff have been purchased and are in place at this time.

Q. Okay. In summary it would appear that since you have arrived you've started almost at ground zero and you have built a program?

A. Yes.

Q. Is that correct?

A. Yes, there was essentially nothing here when I arrived.

Q. I'm going to hand you Respondent's Exhibits S and Q, have you look at those.

A. All right. Respondent's Exhibit S is a September 11 organizational chart.

Q. It's not quite September 11th yet, can you explain?

A. Well, this is the one that will be effective. The reason it's September 11th all the individuals I have hired and have been given permission to hire as a result of special protect designation will be on board by September 11th. The organizational chart begins with Rochelle Chronister as secretary of the SRS.

MS. ORRICK: Your Honor, I object. She's testifying. If they want to try and admit they can

* * *

[p. 58] BY MR. HOUSE:

Q. I wanted you to kind of contrast for us kind of a structure that was in place and frankly, I don't care whether you use Exhibit Q or Plaintiff's Number 2. But I want you to tell us what kind of program was in place when you came in terms of staffing and the people that were available to deliver treatment and what you're going to have now.

A. Exhibit Q shows those people, shows the positions filled, the people available in the program to deliver service treatment when I arrived. Exhibit S shows–

MS. ORRICK: Your Honor, again I object. It's speculative.

THE COURT: overruled.

A. What you have – did you wish me to speak? I'm sorry.

Q. Yes, what does S add that wasn't there at the time you had, at the time you arrived and is depicted by Q?

A. As I indicated there was a, one forensic therapist at that time and ten psychiatric security specialist [sic]. At this time I have two forensic counselors, and have now 12 psychiatric security specialist [sic]. In addition to that I have hired two [p. 59] activity therapists one a one; two social workers, one bachelor's level, one master's level; and an evaluation psychologist who is a master's level

psychologist to the program and my secretary. All these positions have been filled at this time.

Q. They're all filled?

A. Yes.

Q. The hiring completed, the individual may not yet be there but will report to work on or before September 11th?

A. Yes.

Q. Now Exhibit U, do you have that?

A. Exhibit U?

Q. Tell me what that is.

A. These are copies of state personnel, division of personnel services position description forms. With persons who have been hired, their names and the positions that they have assumed in the sexual predator treatment program.

Q. Okay.

A. At this time. These are all the names of all the people that have been hired.

Q. And do all the position descriptions correspond with what's outlined in the order chart, Exhibit S?

A. I'm checking to – were, in the September, line S [p. 60] there are several that aren't here. My position description is not here, nor is C.B. Counts, Janet Schalansky or the secretaries.

Q. Okay. It would be your position and all of the superiors in the state?

A. Right. As well as –

Q. Administration above you?

A. Well, and Chuck Hernandez who was the public administrator for me in SRS, those positions, the Topeka positions are not here.

Q. Mr. Hernandez is located where?

A. In Topeka with SRS.

Q. So position descriptions are not there, the commissioner, secretary?

A. Right.

Q. Mr. Hernandez in Topeka and yourself?

A. Right. All the rest of them are present.

MR. HOUSE: We'll offer U, Your Honor.

MS. ORRICK: Your Honor, could I voir dire please.

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MS. ORRICK:

Q. Ma'am, when I looked at those briefly earlier, there's effective dates on there, does that mean,

* * *

[p. 62] A. What the effective dates shows –

MS. ORRICK: Your Honor, Your Honor, I really don't have any other questions. We would object clearly

this is misleading evidence. We have testimony that they had no staff. Now we have, yes, now we have staff. Your Honor, I think it's irrelevant and the foundation is poorly lacking at the least.

THE COURT: Overruled. Exhibit U is admitted into evidence.

CONTINUED DIRECT EXAMINATION

BY MR. HOUSE:

Q. In addition to the developing this hiring of staff and organizing them and hiring the staff, what else have you done in evolving a program since your arrival?

A. Well, after hiring the staff and staff they come on board they are provided with training, and to that end I have hired Dr. Thomas Lock to provide 39 hours of intensive basic level training of working with sex offenders, sexual predators. He provided that training over a three month period of time. In addition to that there were, there are two manuals that the staff, all the staff coming on board are required to read, go through and study. One is [p. 63] called The Best Kept Secret, which is the title of a book regarding child sexual abuse. The other is an intermediate level training set of modules for staff working with sex offenders.

Q. Show you what's marked Respondent's V and Respondent's Exhibit W, are those the two manuals you were just referring to?

A. Yes.

Q. Those are a copy of the training materials that were utilized in the 39 hour training course you put together?

A. That's right, that's right. The materials have been, the intermediate level training for staff working with sex offenders was materials that I gathered from the State of Wisconsin in addition to that based on the research available. And The Best Kept Secret is a, essentially a book with training module components written by one Florence Rush. In addition to that, the 39 hour direct contact training with Dr. Lock there are, there is also a test that staff take at the end of the training.

Q. Show you what's marked Respondent's Exhibit X, can you identify that?

A. Yes, this is a copy of the basic information training test that I developed to give staff to see [p. 64] how well they had understood, read, were familiar with the materials.

Q. Is the training put on on the location?

A. On location. I contract with Dr. Lock to come out three times two full days apiece and provide the direct training for staff. In addition to that, I videotaped all the materials, well, all the presentations that Dr. Lock conducted at that time. I have approximately twelve 120-minute VCR tapes that I continue to use and have staff observe and use as their basic training for the sexual predator unit.

Q. And all staff are required to take this training?

A. All staff are required to take this training.

Q. Those that are presently on duty have completed the training?

A. There are some who are on duty at this point who have just joined the sexual predator unit and they are at various phases of their training. In addition to the type of training that we've just mentioned here they, of course, are required to do orientation with the corrections facility so that they may understand the runnings of a maximum level security facility as well as other basic training. So they are in process of being trained at this [p. 65] point.

Q. And those staff that will be arriving between now and September 11th will also go through that training?

A. Yes.

MR. HOUSE: we'd offer Exhibits V, W and X.

THE COURT: Any objection?

MS. ORRICK: Yes, Your Honor. Could I voir dire again please?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MS. ORRICK:

Q. Ma'am, my understanding is that you were a police officer and you have a degree in political science and criminology, correct?

A. Public administration.

Q. Okay. And prior to coming to the sexual offender treatment program, did you do any master's in counseling?

A. No, I did not.

Q. Any social work?

A. No.

Q. Any work in psychology?

A. No.

Q. Any work in psychiatry?

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[p. 69] that 1 could draw from a bigger one if we would like to do that. We would strongly object to any of these components being admitted at this time.

THE COURT: Overruled. V, X, W and X are admitted into evidence.

CONTINUED DIRECT EXAMINATION

BY MR. HOUSE:

Q. We have staff, we have them trained are there additional materials besides what's up there that are available to them to kind of continue their training during the course of their employment?

A. There is and there will be ongoing. These particular, this particular program is in a state of development. I have materials, fifty, sixty thousand dollars worth of materials both for staff development as well as programs

for the sexual predators themselves and for use in group, as individuals or in small group use.

Q. Hand you what's been marked Respondent's Exhibit GG, can you identify that?

A. Yes. This is a list of materials or instruments that are or have been purchased and are owned by the SRS sexual predator treatment unit at Larned, Kansas. Essentially it is a four- or five-page document which lists the books or instruments, the [p. 70] author and brief abstract of the work itself or the item that was purchased.

Q. Those are all to be found within the unit at your program?

A. Yes.

Q. And available to staff?

A. Yes, they are.

Q. What was that again?

A. This item?

Q. The exhibit number, I'm sorry?

A. Is this GG.

MR. HOUSE: GG. Offer GG, Your Honor.

THE COURT: GG, any objection to GG? MS. ORRICK: Your Honor, we would object to insufficient foundation.

THE COURT: I'm sorry, I can't hear.

MS. ORRICK: I'm sorry, Your Honor, on insufficient foundation. I don't even know that these books exist or who wrote them. We would object, Your Honor.

THE COURT: It does seem we're getting a little bit far afield.

MR. HOUSE: She just testified that these materials are available. It's a list of them so the court can have some kind of idea what materials are [p. 71] available. Dr. Befort also testified that a lot of things had been purchased, that adequate money had been made available to this program.

THE COURT: These are materials available to this training program?

MR. HOUSE: That's correct.

THE COURT: GG is admitted into evidence.

Q. (By Mr. House) Why don't you tell me a little bit about the basic philosophy you've adopted for the sexual predator program?

A. Essentially it would probably be best expressed by saying it's a 24 hour holistic treatment approach. The idea behind that has a number of elements involved with it. One, that every staff member and every resident in all of their interactions, the reason and the purpose and direction of the training of the staff members is to provide them with a base line of understanding dealing with sexual predators and their concerns. Therefore it provides for an opportunity for staff to interact and specifically focus on the issues and concerns of these individuals as it regards their papers and documents, diagnoses and under the direction of Dr. Befort. So that they may intercede or interrupt any item or behavior that would be reflective of their [p. 72] sexual deviance or sexual violence issues to be able to intercede at those points, as well

as other issues, interpersonal, organizational and unit operations that also hinge off that. Additionally, as Dr. Befort pointed out, he provides what I've asked him to, which is a community treatment meetings. And in those community treatment meetings, there is an attempt by Dr. Befort to provide a place where the residents can speak about direct issues to their confinement, their sexual violence issues, and then staff sits in on that as well. It's a community meeting because both the security staff are there also.

Q. What we're getting in here I think is what Dr. Befort referred to as kind of the ward milieu treatment, is that correct?

A. Yes, it is.

Q. I've heard you break that down into several parts, what's contained within that kind of, you call it a 24-hour holistic treatment environment, is that correct?

A. Yes.

Q. Why don't you kind of take them one at a time, break down those elements?

A. In the total overall, well, it begins with being [p. 73] able to do pre-test and then therefore of course, post-test, the type of treatment, instrumentalities of testing the psychological sex offenders' specific or aspects of sex offenders' histories doing, the history data gathering.

Q. Let's do it this way.

A. Okay.

Q. Let me just start and talk about the role of staff on the unit with regard to the residents there, okay. One

role I suppose would be just guarding them, another would be somehow involved in the treatment program itself. Which do we have and how does that work?

THE COURT: Maybe you could make a proffer and that would speed things up.

MR. HOUSE: Okay.

THE COURT: Seems like you're testifying right now.

MR. HOUSE: I'm trying not to. What I would like to do, kind of the six elements of your holistic program and the first one had to do with staff familiarity with residents and their history and so forth.

THE WITNESS: It's an ongoing, it's an ongoing process of familiarity. It goes back, they read the [p. 74] files, they read the historical files of each and all of the residents when they come in in order to familiarize themselves with the offender's behavior. Also to familiarize themselves with the evaluation reports provided. Along with that, as I've mentioned before, and as these materials presented is the training that they receive in terms of operating and working with people in a sexual treatment program. Sexual offenders treatment program. In addition to that there are processes within the unit in terms of general behavior, what we call the 72 hour forms which has to do with the expectations of behaviors on the unit. The staff are aware of those and the residents have signed those particular forms as well as many outcomes of process. The whole idea of the various steps in terms of both the staff and resident training is that they see the, the staff sees how the residents are interacting because, if you

will, the predatorial behavior, the offending behavior can occur in various and sundry settings even while on the unit. Even while on the unit that unless we're aware of it so that we can have them modify what it is that they're doing in such a way as to stop that behavior that's a part of the treatment –

[p. 75] Q. Okay.

A. – process.

Q. Okay, I think we're getting there now. Staff are given general training in predator-type behaviors, correct?

A. Yes.

Q. They have that knowledge. You said they become thoroughly familiar with the histories of the individual residents?

A. Yes, they read their histories and ongoing unit files.

Q. Would that include other behavior patterns?

A. Yes, that is provided by the various psychological reports and reviews, yes.

Q. Okay. What if staff were to see behaviors that are similar to either their historical patterns or the things that they've been generally taught?

A. Well, at that point in time the purpose of the whole training and that the training that Dr. Lock both provided then and through the materials continues to interact with them to stop the behavior, refocus the

behavior or redirect the behavior firmly or very firmly or gently and provide them with an alternative of behavior.

MS. ORRICK: Your Honor, I would ask that the

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[p. 79] materials, kind of constitute the total of it and we'll be done.

THE COURT: Okay.

Q. (By Mr. House) All right. Okay. Let me show you Respondent's Exhibit T, have you identify that.

A. Yes, this is the mission statement to the unit.

Q. Okay. What does that mean?

A. Well, it means that there are certain basic elements and purpose for the unit. And this is a document that developed sometime ago and then as the focus and direction provides direction for the ongoing development and the underlying goals of the program.

MR. HOUSE: Offer T.

THE COURT: Any objection?

MS. ORRICK: I can't find it. I can't object, I can't find it. Your Honor, we don't have any objection to it.

THE COURT: Admitted.

MS. ORRICK: They can't show they're doing it, that's fine.

Q. Okay. You have mentioned that an assessment of each resident is done, is that correct?

A. Yes.

Q. Let me show you Respondent's Exhibit Y, can you identify that?

[p. 80] A. Yes, this is actually several different documents. The first one is a sex offender history with essentially instructions and definitions for social workers to fill out the offender history documents. In addition to that is what is called a sex offender screening tool research edition, which has a scoring, again a scoring mechanism as well as instructions to the technician or individual filling out the forms as initial part of the assessments.

Q. When is that utilized?

A. I beg your pardon.

Q. When would it be utilized?

A. This is coming into utilization.

Q. And when in the process of the resident being on the facility would this be utilized?

A. This would begin within 72 hours of their coming on to the unit and after a continuous period for 45 days if need be to render this information from court documents and other historical.

MR. HOUSE: Would offer Y, Your Honor.

MS. ORRICK: Your Honor, it's irrelevant. She said it's going to be used. It's not in the assessment packet, has not been used, it's clearly irrelevant.

THE COURT: Sustained.

[p. 81] Q. Let me show you Respondent's Z and BB, can you identify those?

A. Yes. Z is a resident's handbook, and essentially its purpose is as a part of it, it's the orientation manual for the residents coming on the unit. Much of this is as it currently exists with some of these being items that will come into existence, particularly the face program, the face program essentially, as well as some clothing issues and restrictions on items of that might be out.

Q. Okay.

A. And in addition is this BB? Is a memorandum which does an overview of the various shift activities that, this is a document that, that reflects that which will be coming into existence.

Q. Z is the handbook that would be handed residents describing the type of program that is to a lesser extent now being offered and will be offered very shortly here?

A. Yes.

Q. And BB is a daily schedule?

A. Yes.

MR. HOUSE: We'll offer Z and BB.

MS. ORRICK: Your Honor, same objection as to Y. It's clearly irrelevant to this matter. And [p. 82] they've testified it's not in use yet. None of these clients have ever seen it as far as the resident handbook. And as far as the schedule, she also testified that that will be coming into effect and that's not what our clients' schedules are like now.

THE COURT: Maybe I didn't follow this testimony closely as I should have. Is the handbook now in existence?

THE WITNESS: The handbook exists now. Many of the portions of the handbook issues are in effect at this time.

THE COURT: Has the handbook been distributed to the residents of the program?

THE WITNESS: No. It's not been distributed because it would be an in-class orientation specifically walking through, not only that which currently exists but any additions thereto.

MR. HOUSE: Clearly on the cusp here, Judge, of transition to a much more extensive program than has existed.

THE COURT: I don't think the petitions are going to rise or fall on what might be in the future. I think they're going to rise or fall on what is there now. Objection sustained.

[p. 83] MS. ORRICK: Thank you, Your Honor.

Q. (By Mr. House) You recognize the three gentlemen here?

A. Yes.

Q. They are presently on the unit. Just going to show you Respondent's A, B, C and D, if you would identify those?

A. These are journal entries, journal entry of judgment and order for journal entry nunc pro tunc of Leroy

Hendricks, journal entry Paul Lewis Blumenshine, journal entry of judgment Ken Hay, as stated therein Ken Hay on the order of journal entry nunc pro tunc.

Q. Are those the court orders on which authority you hold these three gentlemen in the sex predator treatment program?

A. Yes, it is.

MR. HOUSE: Offer A, B, C and D.

THE COURT: Any objection to A, B, C and D?

MS. ORRICK: If I could look at it briefly.

THE COURT: Are they the same as attached to your answers?

MR. HOUSE: They are, Your Honor.

MS. ORRICK: Your Honor, I don't object to A, B or C. However D, if the court will note, is in Mr. Hay's case specifically an order for journal entry

* * *

[p. 87] been found to be sexually violent predators and likely to commit that type of activity if not detained. And we have taken precautions we think are necessary.

THE COURT: Request denied. See you after lunch.

(A recess was taken for the noon hour, after which the following proceedings were held.)

THE COURT: I apologize for the brief delay. But I trust you agree with me that it's justified that any

time constraints you felt you were previously under are now removed. I believe when we recessed Ms. McClellan was on the stand.

MR. HOUSE: Correct, Your Honor.

THE COURT: You may return to the witness stand and you're still under oath, ma'am.

Q. (By Mr. House) I believe where we left off was that I had just asked you did you maintain records on individual residents at the unit?

A. Yes, we do.

Q. Just briefly explain to me what kind of things would go into the record and how they're created?

A. There is a separate medical record that's maintained by the health care services at the facility. There [p. 88] is a set of historical records which are those reports, psychological, psychiatric reports, treatment reports and that, that have previously been viewed and is part of the information that Dr. Befort looks at. In addition to that there are the day-to-day logs which contain legal documents, some of the medical treatment requests their activities actions on the unit, those that have been observed by the staff, a variety of other miscellaneous records and documents in terms of requests for materials, devices purchases that they wish to make, et cetera.

Q. With regard to the records that deal with their activities on the unit, who is it that makes those records?

A. Those progress notes are maintained both by the staff that are on the unit, most specifically Dr. Befort in regards to his treatment meetings with the residents.

Q. Do the regular staff that provide 24-hour day care make entries into the record?

A. Yes, they do. In those progress records regarding their behavior, their interaction with other residents, their interactions with the staff, particularly citing any instances of behavior that [p. 89] are not appropriate for their treatment processes, and the interactions, interventions of the staff at the time of those behaviors.

Q. Do these records then include whatever assessments are made of the individual residents?

A. Yes, they do.

Q. Would it include whatever plans for treatment that might have been developed?

A. Yes, they include some of the documents that have previously been offered, which is the refusal or acceptance of treatment or the degree of that, plus the plans originally devised by Dr. Befort and carried out in some fashion by Mr. Wright and then the ongoing treatment processes, yes.

Q. So they would record then whatever treatment processes have gone on?

A. Yes.

Q. And would record whatever other activities occurred on the incidents?

A. Going to the library when that was done because we do share the library use, smoke breaks in the yard activities, all of those, everything that can occur within a 24-hour period.

Q. Okay. And we've made copies of all those records and I'll just set them up here and have you identify [p. 90] them. Okay, start with –

MS. ORRICK: Your Honor, if you'd like we can just stipulate to the admission of what's in there.

THE COURT: They offer to stipulate.

MR. HOUSE: That would be fine.

Q. Just let me say then that Respondent's H, I and J are the records of Leroy Hendricks?

A. Yes.

Q. Exhibits K, L and M are the records of Paul Blumenshine?

A. Yes.

Q. And Exhibits N, O and P are the records of Kenneth Hay.

THE COURT: Do you accept their stipulation?

MR. HOUSE: I do.

THE COURT: They're admitted into evidence.

MR. HOUSE: I have nothing else.

THE COURT: Cross?

MS. ORRICK: Thank you, Your Honor.

CROSS EXAMINATION

BY MS. ORRICK:

Q. Ms. McClellan, you're the program director, correct?

A. Yes.

Q. And as the program director you help set up a program, I believe that's what you testified to [p. 91] previously?

A. Yes.

Q. And you don't have anything to do with the delivery of that treatment, correct?

A. That's correct.

Q. Now, the clinical director, he is the person who is responsible for therapy and the treatment?

A. That's correct.

Q. And this is in your program composition, correct?

A. Yes.

Q. So as the person, if the person responsible for the therapy says there's no treatment, you as the program director can't refute your clinical director's position, correct?

A. That would be correct.

MS. ORRICK: Thank you, ma'am. Nothing further.

THE COURT: Anything else for this witness?

REDIRECT EXAMINATION

BY MR. HOUSE:

Q. Have you had any discussions with Dr. Befort in regard to the kinds of treatment that need to be provided to these residents?

MS. ORRICK: Your Honor, I object. It's clearly outside the scope of cross.

* * *

[p. 94] a lot of the exhibits are introduced, for lack of a better phrase, in triplicate, one for each of the petitioners. Would it be appropriate and adequate for me to examine the documents relating to Mr. Hendricks and not the rest of the documents? Would that give me a fair picture of what's going on?

MR. WEILERT: I believe that would work fine with the petitioners, Your Honor.

THE COURT: State have any objection?

MR. HOUSE: You're speaking with regard to the unit records?

THE COURT: That's correct.

MR. HOUSE: Yes, that would be okay.

THE COURT: We'll take a recess. I would anticipate that I would be prepared to announce a decision in approximately 30 to 45 minutes.

(A recess was taken, after which the following proceedings were held.)

THE COURT: Thank you for your patience. First I want to say that those exhibits that were admitted into evidence are returned to the party offering them under the provisions of the Supreme Court rule.

Secondly, I note that this is an action filed under the provisions of Chapter 60 of Kansas Statutes Annotated section 1501, et sequence. 1

[p. 95] Thirdly, I want to say at the outset it's important to recognize that the decision that I'm rendering today is intended to be a legal decision and not a medical or psychiatric decision.

The petitions that were filed allege that the restraint of the petitioners by the respondents is wrongful for roughly six reasons or five reasons. First, they allege that the statutory justification for restraint of a person committed under K.S.A. 59-29(a)01, et sequence, is to provide care and treatment for persons committed under its provisions. The statute 59-29(a)07 says in part, the person shall be committed to the custody of the secretary of Social and Rehabilitation Services for control, care and treatment until such time as the person's mental abnormality or apparent disorder has so changed that the person is safe to be at large. They allege in their petition that there is no clinical director or clinical staff employed at the program designated as the sexual predator treatment program. There is apparently employed a temporary acting clinical director, but there is in fact no permanent clinical director employed at the program. There is clinical staff employed at the program, at least there are a number of persons employed who [p. 96] possess title designations referring to psychiatric services and

pstchological [sic] services. I conclude from the evidence that there is a clinical staff. I make no conclusion regarding their talent, training or abilities as that is not particularly in issue here.

It is alleged in the petition that no treatment is being provided to the petitioners or any other persons committed to the program designated as the sexual predator treatment program. In support of this allegation the petitioners advance the testimony of Dr. Charles Befort, who is the chief psychiatrist at Larned State Hospital. It is argued and suggested that Dr. Befort has testified that there is no one providing treatment to these people, the petitioners at the program. His testimony was in fact that there was no one except for him giving treatment. That is what he testified to during direct examination. He did testify, however, that at one time during the beginning of the program Mr. Hendricks received treatment from a Mr. Wright, but that Mr. Wright apparently was not there when the other two petitioners arrived at the program. Mr. Hendricks apparently benefitted from some treatment that the other two petitioners did not receive.

[p. 97] I conclude from the testimony that a treatment program consists of a number of things. It consists of physical facilities in which to provide the treatment that the program is designed to produce, it consists of staff personnel which are retained for the purpose of providing and delivering the treatment that the program is designed to produce. It consists of treatment programs, or perhaps they should be called modalities of treatment, but they are nevertheless schemes designed to provide treatment to persons in need of that treatment. And lastly, at least it consists of materials and instrumentalities

designed for the purpose of delivering the treatment programs at the hands of the staff personnel.

From the testimony here today it is clear that the physical facilties [sic] of a treatment program exist. That staff personnel incomplete, but nevertheless some staff personnel exist. If I understand the testimony of Ms. McClellan correctly, she is missing two people. One a key person, the clinical director, and the other a clerical person which I would not characterize as being a key person.

Some treatment programs are in place. Certainly it cannot be denied that the petitioners [p. 98] are receiving the benefits of group therapy on at least two occasions per week when Mr. Befort is able to make that schedule. He apparently is distracted from his treatment responsibilities by other responsibilities imposed upon him at the state hospital.

There is also a program that is called ward milieu, which apparently is recognized as a competent means of treatment. There is some question that presented by the petitioners and some testimony that indicates that if that were the only modality of treatment they might be there for a long time. It is, nevertheless, at least some program of treatment and there is testimony that it is not intended nor designed to be a self-sufficient program of treatment or the only program of treatment. There is testimony that the materials and instrumentalities of treatment are present.

I have to conclude that the allegation that no treatment is being provided to any of the petitioners or other persons committed to the program designated as a sexual

predator treatment program is not true. I find that they are receiving treatment.

The fourth allegation of their petition is in [p. 99] fact a conclusion. And that conclusion alleges that without treatment being provided that they are the subject of nothing more than unlawful penal incarceration. Having concluded that they are receiving some forms of treatment, I then find that conclusion to be invalid.

The petitioners further allege that they are wrongfully restrained and that they are denied the right to due process of law and they are being denied their liberties as guaranteed by the 5th and 14th Amendment to the United States Constitution.

Lastly, they allege that their wrongful restraint violates the prohibition against cruel and unusual punishment as set forth by the 8th Amendment to the United States Constitution. They are being held under the color of law as the result of orders issued by courts in which determinations were made that they were sexual predators pursuant to the provisions of K.S.A. 59-29(a)01, et sequence.

I conclude that their restraint does not violate their 5th and 14th Amendment rights, nor does it violate their 8th Amendment rights and neither is it cruel or unusual.

There are no Kansas cases particularly in point on this inasmuch as 59-29(a)01 is a new statute. [p. 100] But there is a Kansas case that is relatively close. And that is *State versus English*, 198 Kansas 196. In which these same issues were raised under the sex offender act that was in place some years ago. Almost identical arguments were

presented and in that case the Kansas Supreme Court expressed that these are justifiable goals and that the manner in which they are being, manner in which the commitment is being conducted is for humanitarian purposes and does not violate the 5th, 14th Amendments to the United States Constitution or the 8th Amendment. So based upon *State versus English*, I find that the incarceration here is not a violation of their 5th or 14th Amendments nor their 8th Amendment nor is it cruel or unusual punishment.

The petitions are hereby dismissed and the costs are assessed to the petitioners.

You will be notified of your rights to appeal by your attorneys. This decision, of course, is appealable by you and I'm sure that they will explain to you how that appeal will occur. Are there any questions on behalf of the petitioners?

MR. WEILERT: No, Your Honor, thank you.

THE COURT: Thank you very much. Are there any questions on behalf of the state?

* * *

SELECTED LEGISLATIVE HISTORY OF THE KANSAS SEXUALLY VIOLENT PREDATOR ACT, KAN. STAT. ANN. 59-29a01 *et seq.*

Approved: 3/10/94
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 10:00 a.m. on February 22, 1994 in Room 514-S of the Capitol.

All members were present except: Marge Petty (excused)

Committee staff present: Mike Heim, Legislative Research Department
Gordon Self, Revisor of Statutes
Darlene Thomas, Committee Secretary

Conferees appearing before the committee:

Attorney General Robert Stephan [sic]
Representative Gary Haulmark
Gene and Peggy Schmidt
Mary Ann Souse
Kelly McCaffrey
Mary Bush
Carla Stovall, Attorney
Jan McCloud, Instructor at Kansas Law Enforcement Training Center

Others attending: See attached list

Chairman Moran announced the issue of capitol punishment would be debated on Thursday, February 24, at 10:00 a.m. in Room 514-S.

SB 666 – fraudulent representation on employment application

SB 667 – inmates sentenced to custody of secretary

Senator Vancrum gave a brief description of *SB 666* and *SB 667* and said they are an outgrowth of Speak Out For Stephanie Task Force, a group that formed in Johnson County after the rape and murder of Stephanie Schmidt last July, 1993. He said they both deal with limited, but important aspects of the sexual predator problem.

SB 525 – sexually violent offense

Senator Vancrum gave a brief description of *SB 525* and said it serves to protect our communities from those offenders who pose the greatest danger to society by providing for commitment and treatment of sexually violent predators. He said *SB 525* is based on a 1990 State of Washington Law which authorized civil commitment of sexually violent predators to the custody of the Department of Social Rehabilitation Services. He said the bill would require a civil jury to find beyond a reasonable doubt that the person is a sexually violent predator based on a psychological evaluation. Senator Vancrum said the fiscal note prepared by State of Kansas, Division of the Budget, was based on the assumption that 90% of the maximum number of individuals that would meet the

criteria for sexually violent offenders would be committed under this act. Senator Vancrum indicated Washington statistics suggest an actual 10% annual commitment rate. (*Attachment No. 1*)

Representative Gary Haulmark testified in support of *SB 525* and provided written testimony (*Attachment No. 2*).

Attorney General Robert Stephen testified in support of *SB 525* and provided written testimony *Attachment No. 3*).

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY, Room 514-S Statehouse, at 10:00 a.m. on February 22, 1994.

Peggy Schmidt, mother of Stephanie Schmidt, testified in support of *SB 525*. Stephanie was raped and murdered in July, 1993. She said the individual who confessed to raping and killing Stephanie had been released after serving half of his sentence for the rape of a college student in 1983. Mrs. Schmidt said only 2% of the rapist [sic] are ever convicted and if they are they serve an average of 3 years in prison.

Gene Schmidt, Father of Stephanie Schmidt, testified in support of *SB 525* and provided the book "Missing Still, Stephanie Rene Schmidt, The Life. The Death. The Dreams" (*Attachment No. 4*). Mr. Schmidt gave a video presentation of Stephanie's life.

Kelly McCaffrey testified in support of *SB 525* and provided written testimony (*Attachment No. 5*).

Mary Livermore Bush testified in support of *SB 525* and provided written testimony (*Attachment No. 6*).

Carla Stovall testified in support of *SB 525* and provided written testimony (*Attachment No. 7*).

Jan McCloud, Instructor at Kansas Law Enforcement training Center testified in support of *SB 525*. Ms. McCloud works with the Wichita Police Department dealing with sex crimes.

Tom Locke, PhD, Kansas Psychological Association provided written testimony (*Attachment No. 8*). in support of *SB 525*.

Mary Ann Souse, a victim of rape, testified in support of *SB 525*. She said the man convicted of raping her received 15 years to life on a plea bargain and it is possible for him to be paroled in 7.5 years on good behavior. She asked that the law be changed for convicted rapists to serve their full time, not half.

Meeting adjourned at 11:00 a.m.

The next meeting is scheduled for February 22 at 12:30 p.m. in Room 527-S, 1994.

State Of Kansas

[SEAL]

Topeka

Senate Chamber
State Capitol
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(913) 296-7361

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Committee Assignments
Vice-Chairman: Energy
And Natural Resources
Member Ways And
Means Judiciary
Member Commerce,
Labor And Regulations
Committee, National
Conference On
State Legislatures
Member: Environmental
Task Force, Council
On State Governments

TESTIMONY FROM SENATOR BOB VANCRUM
TO THE
SENATE JUDICIARY COMMITTEE

RE: SB 525

The Sexual Predator Act (SB 515) serves to protect our communities from those offenders who pose the greatest danger to society by providing for treatment and commitment of sexually violent predators until they are no longer a danger. Based on a 1990 Washington law

which authorizes the civil commitment of sexually violent predators to the custody of the Department of Social and Rehabilitative Services for control, care and treatment. The bill requires a civil trial in which the court or jury finds beyond a reasonable doubt that a person is a sexually violent predator based on a psychological profile showing a mental abnormality or personality disorder making him likely to engage in predatory acts of sexual violence. Furthermore there is an opportunity for regular review of the issue of whether the offender remains a danger to society.

The bill is narrowly tailored to focus on the small number of habitual sex offenders who, because of their psychological makeup, pose an immediate danger to the public as soon as they are released from prison. According to the *Seattle Times*, for example, about 25 commitment petitions have been filed since Washington state's law as passed in 1990. Of those, 12 people were committed and several others are pending.

Although the official fiscal note for SB 525 places the cost of implementing the Act in Kansas at more than $8.6 million, it should be noted that this figure assumes a commitment rate of 90% of the maximum number of individuals meeting the criteria for sexually violent offenders. A more realistic figure is $898,000, which assumes a commitment rate of 10% of the persons who might be committed under the bill or 33 people. Please carefully review the attached material from George Vega of the SRS showing ranges of cost with different assumptions as to numbers committed. Moreover, the planned changes under mental health reform likely will provide the state with space to house those found to be sexually

violent predators, further reducing the cost of implementation.

The real life tragedies of families like the Schmidts are reason enough to pass this bill, to ensure that these few sex predators are provided treatment and not released back into society until they no longer pose a danger to the community. Moreover, the bill accomplishes this through a scheme that has been held to the constitutional [sic]:

The bill meets the requirements for civil commitment set forth by the U.S. Supreme Court in *Foucha v. Louisiana* in that it:

1) is narrowly tailored to serve a compelling state interest
2) requires proof the detainee suffers from a mental illness or severe personality disorder
3) places the burden of proof as to dangerousness on the state.

The bill is consistent with due Process in serving a compelling state interest and in placing upon the state the burden of proving the detainee is both dangerous and suffering from a severe personality disorder or mental illness.

Finally, like the statute upheld by the Washington Supreme Court, the bill does not serve any punitive goal. It is civil in nature and thus does not offend the double jeopardy clause, which applies to criminal matters.

[SEAL]
JOAN FINNEY, GOVERNOR OF
THE STATE OF KANSAS

KANSAS DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES
DONNA WHITEMAN, SECRETARY

January 28, 1994

The Honorable Robert Vancrum
The State Senate
State capitol Building, Rm. 449-N
Topeka, Kansas 66612

Dear Senator Vancrum:

Senate Bill 525 proposes to provide a system of civil commitment to a facility operated by SRS for persons completing a prison sentence for specified violent, sexual offenses. Determining annual costs for a new program is difficult without a full understanding of the specific goals of the proposed legislation.

We contacted the Department of Corrections and determined there were 331 individuals released during FY 1993 who met the criteria stated in Section 2 of this bill. We are not able to make an accurate estimate on how many of these individuals would be committed to SRS custody. The projected annual cost for each resident of the State Security Hospital for FY 1995 is $57,966. The first year costs could range from (assuming an average stay of 6 months for new admissions) $989,473 for 10% of the released population to $9,593,373 for 100%.

Currently, the State Security Hospital at Larned, Ks. has approximately 30 available beds. The first year of Mental

Health Reform downsizing closed 30 adult beds, which allowed us to correct overcrowding on the Security Behavior Ward, but created no new available beds. The final two years of reform could make from 40 to 60 beds available, assuming appropriate remodeling. Should the expected bed need created by SB 525 exceed 70 to 90 beds a new facility would be required. The Attachment provides construction estimates for various sized secure facilities. These estimates were based upon the costs of construction of the Correctional Mental Health Facility in Larned, Ks.

Please do not hesitate to contact George D. Vega at 296-3773 if you need any additional information.

Sincerely,

/s/ Donna L. Whiteman
Donna L. Whiteman
Secretary

DLW:DAJ:hb

cc: Senators Bogina, Bond, Burke, Corbin, Emert, Feleciano, Frahm, Hardenburger, Harris, Kerr, Langworthy, Lawrence, Martin, Morris, Oleen, Papay, Parkinson, Ramirez, Ranson, Reynolds, Rock, Salisbury, Sallee, Steffes, Tiahrt and Vidricksen

SENATE BILL 525 CARE AND TREATMENT

10% ANNUAL COMMITMENT RATE

	FY 1995	FY 1996	FY 1997	FY 1998	FY 1999	FY 2000
ANNUAL COST	57,966	59,705	61,496	63,341	65,241	67,198
CENSUS:						
BEGINNING	0	33	63	90	114	136
ADMISSIONS	33	33	33	33	33	33
DISCHARGES	0	3	6	9	11	13
ENDING	33	63	90	114	136	156
TOTAL ANNUAL COST	898,473	2,865,839	4,704,454	6,460,783	8,155,155	9,810,978

100% ANNUAL COMMITMENT RATE

	FY 1995	FY 1996	FY 1997	FY 1998	FY 1999	FY 2000
ANNUAL COST	57,966	59,705	61,496	63,341	65,241	67,198
CENSUS:						
BEGINNING	0	331	629	897	1,138	1,355
ADMISSIONS	331	331	331	331	331	331
DISCHARGES	0	33	63	90	114	136
ENDING	331	629	897	1,138	1,355	1,551
TOTAL ANNUAL COST	9,593,373	28,655,405	46,918,779	64,459,584	81,348,886	97,653,114

State Of Kansas

[SEAL]

Topeka

House Of Representatives

Gary Haulmark
Representative
30th District
Johnson County
8709 Gallery
Lenexa, Kansas 66215
(913) 894-2035
Room 181-W.
Capitol Bldg.
Topeka, Kansas 66612-1504
(913) 296-7636

Committee Assignments
Vice Chair
Economic Development
Member
Transportation
Rules & Journal
Joint Committee On
Economic Development

Testimony in Support of S.B. 525

Thank you Mr. Chairman and members of the committee for the opportunity to testify today in favor of S.B. 525, otherwise known as the Sexual Predator Act.

As you may know, this bill was one of five pieces of legislation designed this past fall by an Ad Hoc Sexual Offender Task Force in Johnson County. The task force was composed of legislators, law enforcement officials, parole board members, probation officers, concerned citizens and of course, Gene and Peggy Schmidt. This legislation was based on current law in the state of Washington. It seems to be serving it's [sic] purpose there and has been found constitutional.

Lines 25 to 29 get to the heart of the matter; sexually violent predators generally have antisocial personality

features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The Sexual Predator Act would go after anyone convicted of, or charged with a sexually violent crime and who suffers from a mental abnormality or personality disorder. Our task force saw statistic after statistic which indicated these people will re-offend 50% to 90% of the time if allowed the opportunity.

Very simply, the bill would allow the prosecuting attorney to file a petition before the release of the inmate, alleging that this person is a "sexually violent predator. Upon filing of the petition the judge would determine if probable cause exists and an evaluation would be conducted by a qualified professional. Then within 45 days, the court would conduct a trial to determine if the person was a sexual predator. If the court determines that the person is a predator, they would be committed to the custody of SRS for control, care and treatment.

Mr. Chairman, it is time for us to step up to the plate and do something about an obviously serious problem. Lee Iacocca said, "Lead, follow or get the hell out of the way". Well, let's be leaders, let's pass this bill and begin to deal with a problem we can not just sweep under the rug.

I'll be glad to stand for any questions.

[SEAL]

State Of Kansas

Office Of The Attorney General

2nd Floor, Kansas Judicial Center,
Topeka 66612-1597

Robert T. Stephan
Attorney General

Main Phone: (913) 296-2215
Consumer Protection: 296-3751
Telecopier: 296-6296

Testimony Before Senate Judiciary
Senate Bill 525
By Robert T. Stephan, Attorney General
February 22, 1994

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to rise in support of Senate Bill No. 525.

From your therapeutic perch as legislators, you have an opportunity to pass what might be the most significant preventive criminal justice legislation to be presented in this 1994 session of the Kansas Legislature. Most new laws against criminal conduct tend to provide punishment after the victimization has occurred. Senate Bill 525 will act prospectively and be preventative of criminal conduct and not just punitive. You have a rare opportunity to pass a law that will keep dangerous sex offenders confined past their scheduled prison sentence. As I am convinced none of them should ever be released, I believe you, as legislators, have an obligation to enact laws that will protect our citizens through incapacitation of dangerous offenders.

Under the provisions of the sentencing and parole system in effect prior to July 1, 1993, a violent sex offender could serve the full sentence and be released without any relevant safeguards for the public. In the same manner under the sentencing guidelines, a violent, sex offender will be released at the end of the sentence imposed. With either system, there has been no adequate legal provision to continue incarceration of violent sexual predators past the period of mandatory incarceration. Senate Bill 525 fills the void and provides for the continued incapacitation of sex offenders through an appropriate constitutional incarceration of persons who commit sexually violent offenses and continue to be a sexually violent predator at the expiration of their period of imprisonment.

If there was ever a law which should be passed unanimously be the legislature, this is the one.

TESTIMONY

SENATE BILL 525

February 22, 1994

Mr. Chairman and Members of the Senate Judiciary Committee:

Thank you for the opportunity to speak before you. My name is Kelly McCaffrey, and I am speaking today as a student of the law, a woman of this community, and a citizen of this state. And I am speaking today of personal tragedy, public outrage, and unspeakable cruelty.

And I am speaking out for Stephanie in support of Senate Bill 525.

In anticipation of this legislation, I have spent the last few months extensively researching the implications of civilly committing sexually violent predators. My findings will be published this Spring in the *University of Kansas Law Review*. Ultimately, I believe that the Task Force has presented the legislature with a workable and constitutional solution. I will leave those arguments, however, for the experts to present. I would like to focus, instead, on an aspect of SB 525 that the Committee may not have heard. Specifically, I would like to address an argument that I anticipate opponents of SB 525 will present to this Committee, if past years serve as any indication.

Inevitably, several terms and definitions used in SB 525 will be a source of great consternation for some opponents of the bill, particularly those in the field of psychiatry. Such terms include "sexually violent predator," "mental abnormality," and "personality disorder." The argument is that such terms are merely legal, with no

clinically significant meaning and no recognized diagnostic use.

First, it must be emphasized that such terms in identical statutes have been upheld as constitutional. I would like to move beyond the constitutionality of those terms, however. In doing so, I urge this Committee to look beyond the language of the law, to the story that gave rise to the bill in the first place. Here, the story is that of the brutal and senseless rape and murder of a 19-year-old girl. And it is the story of a man with a history of sexual offenses. It is a story told by her parents, her sister, her friends and her community, and it is filled with grief, anger and frustration. That tragic story is before you today as SB 525.

The problem lies in translating the language of life into the language of law. Inevitably, much is lost in that translation. We are forced to cast the story of Stephanie into another form, that of a statute. Unfortunately, the violence, the pain, and the outrage do not lend themselves very well to the generalized and categorized language of the rule. This difficulty emanates from the fact that "legal rules are a specialized form of language that must respond to the human experiences that gave rise to them in the first place. Yet legal rules must also structure that response in a way that allows them to be applied consistently and reliably." (J. Christopher Rideout, *So What's in a Name? A Rhetorical Reading of Washington's Sexually Violent Predators Act*, 15 U. Puget Sound L. Rev. 781 (1992)).

In the real-life story of Stephanie's murder, the nature of a man like Don Gideon is defined by his actions, by his

words, by his cruelty. His nature is defined by the tremendous loss that Gene, Peggy, and Jeni Schmidt have suffered at his hands. The voices of the people in this community can tell you that Don Gideon should not have been free to commit this heinous crime.

In a statute like SB 525, on the other hand, the nature of a man like Gideon must be ascertained through overt definitions and structured categories. The law requires it. So, faced with the arduous task of translating the passion and pain of Stephanie's death, the story underlying the statute, into the objective, voiceless language of the statute itself, the Task Force has used the phrase "sexually violent predator." In ordinary society, the type of person who would constitute a sexually violent predator is readily understood. Most would agree that Don Gideon is a sexually violent predator. But, statutes cannot rely on the collective beliefs of ordinary society. The overriding demands of the language of the rule have silenced the story behind that rule.

Stephanie has told her story. How many more stories need to be told before the legislature will listen?

Speaker: Mary Livermore Bush Date: Feb. 22, 1994
Subject: Passage of Sexual Predator Act

I never knew Stephanie Schmidt, and from all reports, that was my loss. As a matter of fact, I didn't know Gene, Peggy, or Jeni Schmidt until I "met" them through the media as they walked through the nightmare of their daughter's brutal death.

Unlike the Schmidts, I have never been the victim of a terrible crime, nor has any member of my family. That is one of the reasons I am here today, urging passage of the Sexual Predator Act. I fear there is a tendency among lawmakers and legislators to think it is only the victims of horrible crime, like the Schmidts, who care about the passage of this bill. It simply isn't true. I believe that as citizens, my family and I have a basic right to protection. Currently that right is being shamefully violated because the justice system works against me, allowing monsters like Don Gideon, Stephanie's murderer, to roam the streets – when he was supposed to be locked away. Stephanie really had no chance, you know. Neither would my child or yours in the same situation. Not only was Stephanie not allowed to know about Gideon's hideous past as a convicted rapist, she expected that since he was walking the streets, he was safe. In fact, he was following the tendency of the typical sex offender; he was searching for another victim. Had the Sexual Predator Act been in effect a year ago, Gideon would have served his time, and before release been required to spend time in a mental institution where chances are, his horrible tendencies would have been discovered. And Stephanie Schmidt would be alive today.

It has been said that perhaps the Schmidts are too close to this, too emotional to be objective. I believe that each and everyone of us must put ourselves in the Schmidt's shoes – and see our child's face where Stephanie's was. Only then can we even come close to realizing what these monsters take from us – and that we all MUST do something to stop them!

As a citizen and parent, my plea today is this: sentence these criminals harshly – and keep them locked up. When they have served their time, don't just open the prison door and watch as they search for another innocent victim, like Stephanie Schmidt.

Please help me protect my children by allowing my rights as a law-abiding citizen not to be overshadowed by leniency to social deviates.

/s/ Mary L. Bush
Mary Livermore Bush –
Feb. 22, 1994
11732 High Drive Leawood,
KS. 66211
(913) 3399912

TESTIMONY OF CARLA J. STOVALL
SENATE JUDICIARY COMMITTEE
SB 525
FEBRUARY 22, 1994

The sexually violent predator bill – a bill that would keep still sexually violent inmates off the streets after their criminal sentence has been served. Not passing this bill would allow convicted rapists and child molesters to walk through prison gates and back into our communities to rape and molest again.

And rape and molest they will. One study of 126 rapists that I recently read indicated that they had an average of 7 victims each. An F.B.I. study of serial rapists showed an average of over 20 rapes each in their histories.

The statistics on child sexual abuse offenses is absolutely staggering. A study funded by the National Institute of Mental Health reported on 453 sexual offenders who had abused an average of 52 girls or 150 boys each. The same study indicated that the typical offender begins molesting children when he is 15 and molests an average of 117 children – most of whom do not report the molestation.

Because of the nature of sexually violent crimes and the psychological makeup of those who are prone to commit them, we must take extraordinary precautions to protect society from them. This means enacting this bill into law across the state of Kansas. We cannot open our prison doors and let these animals back into our communities. If we do – we are accomplices to the atrocities which they will surely commit.

Let me share with you for a moment the utter frustration I experienced as a member of the Kansas Parole Board. I would routinely see sexual offenders and pass them as long as possible (which was usually one year). I would see them each year and deny release again and again. But when the inmates reached their conditional release date (which was one-half of their maximum sentence), they had to be set free.

The file would come to the Board only for the purpose of setting conditions for their release. We would establish requirements such as: Report to the parole officer. Maintain employment. Have no contact with the victim or victim's family. Attend sexual offender treatment.

As I would write out those conditions, a knot would always grow in my stomach. I knew the rapists or child molesters were being turned loose on an unsuspecting public to reoffend. I knew there was at least one woman or one child, but probably more, who were going to fall victim to this animal. It was as certain as the sun rising the next morning. And there was nothing I could do to prevent it. That was the sickening thing. We were condoning the future victimization – permitting it – allowing it. Because we couldn't stop it.

Donald Gideon is the despicable individual who has caused the heightened awareness of the desperate need for this bill. Gideon was a convicted rapist and was in our Kansas prisons while I was on the Parole Board. I saw him 3 times and denied him release 3 times because of his prior rape conviction and because of his demeanor and behavior. And yet he was given his freedom after serving all of his sentence. He was not given his freedom one day

early – he served all the time the state had sentenced him to. But we gave him his freedom. The freedom he needed to rape a young woman in April and the freedom to then rape and murder Stephanie in July. Had a bill like this become law when it was first introduced a few years ago, I am certain Donald Gideon would never have been released. He would have been found to be sexually violent. You must do everything within your power to ensure this bill becomes law. Do not lose interest in it and let it languish like your predecessors.

The situation in Kansas now is no better with sentencing guidelines than under indeterminate sentencing. There are a total of 24 sexual crimes under current Kansas law and only 4 carry longer sentences under guidelines **when using the worst criminal history** (which most inmates do not have) and that is because all 4 were misdemeanors under the old system. In addition, 13 of the 21 child sexual abuse crimes carry presumed probation unless the inmate has a substantial criminal history.

The lesson is that under guidelines fewer child sexual abuse crimes will result in incarceration because of the high number which carry presumed probation. For those that do go to prison, the sentences are shorter than what could have resulted under the old system. For example, an inmate convicted of raping an adult woman or a child, who has no prior criminal history and earns all his good time, will only spend 4 years and 7 months behind bars. Those particular crimes carried a possible maximum of life imprisonment under the old system and the inmate did not ever have to be released. Our streets are much less safe now. The sexually violent predator bill is absolutely critical!!

This bill would allow us to stop the sure and certain victimization. It would allow us to keep the sexually violent offenders locked up indefinitely. This is our obligation to provide for public safety in this way.

(LOGO) KANSAS PSYCHOLOGICAL ASSOCIATION

February 3, 1994

Senator Marge Petty
State Capital Building, Room 523-S
Topeka, KS 66612

Dear Senator Petty:

Thank you for providing me with the opportunity to review SB 525, the proposed legislation regarding sexually violent predators (SVP). I am sorry that my response was not more immediate. I did want to consult with my other colleagues in KPA so that our response would represent a broader perspective than my own. I hope the information provided is still timely and useful.

Page 1, lines 25-29

Sexual offenders with antisocial personalities or antisocial traits are certainly problematic in terms of treatment and recidivism. My worry is that the statute over-focuses on those conditions, to the neglect of equally problematic conditions. Equally problematic are adults receiving the diagnosis of Pedophilia, Not Limited to Incest, Exclusive. These are adults who have an established sexual preference for prepubescent children and are unlikely to find adult sexual relations meaningful or satisfying. These

adults tend to have many victims, are not likely to engage in physical violence, and have little appreciation for how their behavior damages children. They maintain well-entrenched cognitive distortions regarding their offending behavior that prevent them from considering new information and changing their behavior. These men are the sort of offenders the general public thinks of when asked to think of a typical pedophile. On the other hand, some offenders who have only one or two victims and whose crimes are incestuous in nature can also be seen as SVP because of the denial and distortions surrounding their behavior towards their own children or step-children. Many times their behavior is just as entrenched and aggressive as other types, even though confined to familial relationships. Finally, adults presenting with sexually sadistic behavior patterns would be likely candidates for SVP designation. It would not be productive for this legislation to focus too narrowly on antisocial offenders. At the same time, you can begin to appreciate the scope of the problematic behavior that would be addressed with such a bill. The costs of commitment and confinement should be considered in this regard especially in light of the refractory nature of these conditions.

Page 1, Line 29-30

This statement confuses the likelihood of re-offense for SVP with the likelihood of re-offense for sexual offenders in general. The probability of recidivism for the former group is likely to be much higher than for the latter group. It is important to note that the vast majority of sexual offenders, particularly sexual offenders against children, are convicted of sexually violent crimes as

defined by this statute. These adults almost always present with a mental abnormality as defined by DSM-III-R. The majority of offenders would not need to be committed under this statute to ensure community safety. I am concerned about the public reaction that would result if all offenders convicted of these offenses are seen and treated by the public and the judicial/mental health system as SVP's. Clarity and specificity in our conceptualization and our language seems essential.

Page 1, line 39

Professionals in this area do not think of "curing" sexual offenders; the focus is on equipping the offenders with the skills to control their impulses toward deviant behavior. The efficacy of teaching these skills to most sexual offenders is well established, in spite of comments to the contrary made to your committee by individuals unable to discriminate among sexual offenders. Conversely, the difficulties involved in teaching these skills to SVP's is also well established.

Page 2, lines 5-8

I wonder if it is possible to expand the definition of SVP to include offenders convicted of one sexually violent offense who complete a reputable sex offender treatment program and then go on to commit a second sexually violent offense. That should stand as evidence that even with appropriate intervention, the offender is not able or willing to control sexually deviant behavior. In this case, the determination of SVP would be made after the second conviction but before incarceration. It is clear that the

best predictor that incarceration/treatment will not function as a deterrent is an individual's past failure to benefit from those learning experiences.

Page 2, line 25-26

Criminal sodomy includes consensual, though illegal, homosexual behavior. If consensual gay/lesbian adult sexual behavior is defined as a sexually violent offense *and* that person has any sort of "mental abnormality," *and* that person enters a relationship with the purpose of being sexual with another adult, then it seems to me that the person is committing another sexually violent offense which is very predictable. Could that person be committed under this statute? Aggravated criminal sodomy (lines 27-28) could cover crimes of oral/anal assault against a child or those behaviors toward an adult who did not consent. Would it be possible to remove criminal sodomy from the list of sexually violent offenses without damaging the intent of the statute?

Page 2, lines 5-12

The text speaks to the prediction of violent behavior. The literature regarding the prediction of violent behavior is not conclusive; some would say it is not even promising. I suspect challenges will most likely occur at this point in the process with revolving "expert witnesses" testifying on both sides of the argument. Any evaluator will be ethically required to address the validity of his or her predictions. I wonder if it would be possible to have the court appoint an expert acceptable to all parties to evaluate the alleged SVP. Would that be more judicially and financially efficient? At any rate, it should be understood

that any predictions of future behavior in this realm may have limited validity.

Page 3, lines 7-15

The statute addresses how the "agency with jurisdiction" will notify the county in which the offender was charged. That agency will typically be DOC. DOC will likely have information that the offender is a SVP because treaters working with the offender will have reached that conclusion. Presently, offender treatment is provided by a private contractor operating within DOC. Consequently, according to statute, valid and informed consent needs to be obtained from the offender in order to release treatment information to DOC. The offender can revoke his or her release at any time, and information provided to DOC would be significantly restricted at that point. The offender could leave the system after serving his or her maximum time, the treaters could see that offender as a SVP, but because the consent to release information about therapy had been revoked, DOC could not be alerted to set the necessary process in motion. I wonder about a provision in the statute to address that possible scenario.

Page 3, lines 30-32

The text addresses issues of immunity from liability for "agencies with jurisdiction, its employees, and officials." I would suggest that the immunity extend to employees of private contractors working within DOC, as well as to experts retained by the court to address pertinent issues within this process or to other practitioners who might be involved in the legal process around this statute.

Page 4, lines 1-4

If probable cause exists to believe that the offender is a SVP, the court appoints a person "professionally qualified" to examine the offender to confirm that finding. That professional must have access to all pertinent information, including that information that might be held by treaters working within but not employed by DOC. Many professionals are prohibited by statute from disclosing treatment information without the offender's consent; the client's right to privilege must be protected or the professional is guilty of unethical and illegal behavior. It is imperative that the evaluating professional have access to all information so that the determination of whether or not the offender is a SVP does not rest only on the professional's observations of and interview with the offender. I wonder if it would be possible to address access to information held by private contractors employed by DOC as well as other possible sources of information.

Page 5, lines 33-38

I believe the probability that a professional would take a position that an individual once found to be a SVP is no longer dangerous is very low. Our ability to change an individual's sexual preference for children or eliminate the urge to express sexual and violent impulses together is limited. Lengthy periods of commitment with little likelihood of release are almost inevitable. Perhaps that is simply the goal of this statute. In my opinion, adequate facilities and treaters to address this pattern of deviant behavior does not exist within the Department of Social

and Rehabilitation Services. Significant funding to establish and maintain such a state of the art treatment facility and monitoring program would be essential.

In regard to your question about mandating post-incarceration supervision, I believe that any individual who has committed a sexual crime could benefit from post-incarceration supervision *and treatment*. Perhaps the length of supervision/treatment could be arbitrarily set at five years for each of the sexually violent offenses identified in his bill. In many cases, it would be possible to relax that requirement once the parole officer and the therapist are able to assess the offender's reintegration into the community and the offender's ability to implement his or her relapse prevention plan.

Two points come to mind, following that. Firstly, to be most efficient, there would need to be very close coordination between those providing treatment to offenders during incarceration and those providing follow-up treatment. That coordination occurs in other states under the auspices of a statewide agency that coordinates all aspects of sexual offender treatment. Perhaps such an approach should be considered in Kansas.

Secondly, if community agencies are to be expected to provide quality treatment over the long term to individuals reintegrating into the community, resources must be made available to those agencies. Upon release from DOC with a conviction for a sexual offense, particularly a sexual offense against a child, offenders are often underemployed, if not unemployed, for extended periods of time. Consequently, their financial resources are inadequate to pay for the necessary treatment. In my opinion,

the provision of quality treatment following incarceration will not be a viable financial possibility for agencies if the state does not allocate sufficient funding. The short-sighted solution of mandating post-release treatment but not providing funding will only result in the illusion that the problem has been effectively addressed.

I hope you find these thoughts useful. I know that SVP's and the heinous acts they commit command immediate attention in our society. I would hope that the legislature remembers, however, that the vast majority of victims of sexually assaultive crimes are not victimized by SVP's. I would hope that eventually attention and monetary resources are directed to this population of victims and offenders, as well. If every SVP in Kansas could be identified and committed under this proposed statute, hundreds of women and children would continue to be assaulted; I believe the damage those assaults produce and the impact on society of failing to effectively intervene with prevention and remediation strategies in these cases is profound and is, in certain ways, more damaging than the profound damage that results from the crimes committed by the SVP.

Thank-you again for the opportunity to respond. As a member of the KPA's legislative sub-committee on forensic issues, we would be more than happy to provide information and feedback on this and other ills related to the criminal justice system. Please feel free to contact myself, our sub-committee chair, Dr. Robert Reitz (913/782-2100), or our legislative chair, Dr. David Rodeheffer (913/234-4743).

Sincerely,

/s/ Tom Locke, PhD
Tom Locke, Ph.D. Rsj

Approved: 3/15/94
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 10:00 a.m. on February 23, 1994 in Room 514-S of the Capitol.

All members were present.

Committee staff present: Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Revisor of Statutes
Darlene Thomas, Committee Secretary

Conferees appearing before the committee:

Paul Morrison, District Attorney, Johnson County
Jim Blaufuss, Schmidt Task Force
Detective Sergeant Craig Hill, Leawood Police
Howard Snyder, Kansas Alliance for Mentally Ill
Jim Karlin, SW Guidance Center, Liberal

Walter Thiessen, Community Mental Health Division of Prairie View, Inc., Newton
Joyce Lile, Christian Center for Prisoners Rights
Lynn Stemm, Victim Assistance Coordinator, Kansas District Attorney
Raymond L. Spring, Distinguished Professor, Washburn University School of Law
Carla Dugger, American Civil Liberties Union

Others attending: See attached list

SB 666 – fraudulent representation on employment application
SB 667 – inmates sentenced to custody of secretary
SB 525 – sexually violent offense

Paul Morrison, District Attorney, Johnson County testified in support of SB 525 and provided written testimony (Attachment No. 1). He said we should try to target those sexual offenders who have the propensity to reoffend and this could be done through the adoption of civil commitment procedure.

Detective Sergeant Craig Hill, Leawood Police testified in support of SB 525 and provided written testimony (Attachment No. 2).

Mr. Morrison introduced Greg Canova, Chief Deputy Attorney General for the state of Washington who provided via telephone conference call testimony regarding the sexual predator bill in Washington. He has been involved in their state's litigation and overseeing the program in Washington. Mr. Canova said this bill applies to a very small group of offenders. There has been an average of 300-400 convicted sex offenders per year since this bill went into affect in June, 1990. After screening, there has only been 111 referred to the Attorney General's

Office since 1990. Out of the 111, they filed on 28. He said they developed a standard that before they file a civil commitment petition against a person they must have more than one prior conviction and a provable pattern of prior sexually violent. Mr. Canova said the Washington law was found to be constitutionally permissible in August, 1993 when the Supreme Court of Washington upheld the statute in a 6 to 3 opinion.

Paul Morrison, District Attorney, Johnson County recommended amendments to SB 525, to add language requiring filing a petition within 30-45 days.

Jim Blaufuss, member of the Schmidt Task Force testified in support of SB 525 and provided written testimony (Attachment No. 3).

Howard Snyder, Kansas Alliance for Mentally Ill testified in opposition to SB 525 and provided written testimony (Attachment No. 4).

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY, Room 514-S Statehouse, at 10:00 a.m. on February 23, 1994.

James Karlan, South West Guidance Center testified in opposition to SB 525 and provided written testimony (Attachment No. 5)

Joyce Lile, Christian Center for Prisoners Rights testified in opposition to SB 525 and provided written testimony (Attachment No. 6).

Walter Thiessen, Community Mental Health Division of Prairie View, Inc., Newton testified in opposition to SB 525 and provided written testimony (Attachment No. 7).

Lynn Stemm, Victim Assistance Coordinator, Kansas District Attorney provided written testimony in support of SB 525 (Attachment No. 8).

Raymond L. Spring, Distinguished Professor, Washburn University School of Law provided written testimony regarding SB 525 (Attachment No. 9).

American Civil Liberties Union provided written testimony in opposition to SB 525 (Attachment No. 10).

Meeting adjourned at 11:00 a.m.

The next meeting is scheduled for February 23, 12:30 p.m., Room 531-N., 1994.

COMMENTS TO MEMBERS OF-
SENATE JUDICIARY COMMITTEE

RE: SEXUAL PREDATOR ACT - SENATE BILL #525

FEBRUARY 23, 1994

I'm here today to testify in support of Senate Bill Number 525. Much attention has been given recently to the question of how best to keep the public safe from sex offenders. As we struggle with this question, one fact becomes absolutely clear; a small number of offenders commit the vast majority of criminal activity.

As can be seen from the attached article from the September, 1991, *Journal of Interpersonal Violence*, active sex offenders commit an incredibly high number of crimes in comparison to their arrests. For example, the 1985 study by Freeman-Longo of self-reporting of sex offenders in a forensic mental health program indicated that the 53 offenders reported a total of over 25,000 sex offenses that they had perpetrated. While the child molesters in the group average 1.5 arrests per man, their self-reports yielded over 20,000 sex offenses. Other studies have buttressed these findings.

I feel the best way to deal with this small but persistent group of offenders is through a civil commitment procedure such as the Sexual Predator Act. This act is designed to apply to very few offenders. However, those offenders, once incarcerated, should make a big difference in victimization rates. In the State of Washington, where this has been law since 1990, approximately 30 people are in various stages of the program. In August of 1993, the Supreme Court of Washington approved the constitutionality of this law.

The advantages of this bill are that it incapacitates those who truly oppose the greatest danger to society. As such, it is much less expensive than massive across the board sentence increases for sex offenses. This is the new type of legislation which "targets" specific offenders for removal from society. The down side, however, is that because it is so new it is largely untested nationally. As such, as in Washington, there is some risk of legal problems. It is, however, a step forward. I truly believe it is a good piece of legislation that needs to be passed by this body.

Attachments:

1. Excerpt from the *Journal of Inter-Personal Violence*, September, 1991
2. Confiscated letter from an inmate serving time with the Kansas Secretary of Corrections for attempted child molestation to another inmate discussing their plans upon release.

Thank you for your time.

/s/ Paul J. Morrison
Paul J. Morrison, District Attorney
Johnson County, Kansas

Using a computer-administered interview, self-reports of past criminal behavior were obtained from 99 institutionalized sex offenders. The sample contained both rapists and child molesters who had been mandated to receive specialized treatment. Offenders disclosed an enormous amount of undetected sexual aggression, a finding consistent with other self-report studies. Also striking was the high rate and variety of nonsex offenses. According to interview responses, nearly 20,000 nonsex crimes were committed during the year prior to institutionalization, with rapists contributing a disproportionate share. Still, child molesters, including those whose only known crime was incest, were very active in assault and property crimes. The potential for utilizing sex offender self-reports in empirical research is discussed. Preliminary evidence of validity is presented.

SELF-REPORT OF CRIMES COMMITTED BY SEX OFFENDERS

MARK R. WEINROTT
Oregon Social Learning Center
MAUREEN SAYLOR
Western State Hospital

Although crime statistics and victim surveys can be useful in evaluating overall trends in the amount and reporting of crime, they provide no dependable information about the distribution of crimes among known offenders. It is a foregone conclusion that in the realm of sexual aggression, the number of offenses committed by most perpetrators exceeds those documented in law enforcement files. Indeed, it has been shown that many rapists and child molesters are chronic perpetrators and have avoided

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Authors' Note: Correspondence regarding this manuscript should be addressed to Mark R. Weinrott, RiverPlace, Suite 307, 0305 SW Montgomery Street, Portland, OR 97201.

apprehension for dozens – and in some cases, hundreds – of sex crimes (Able et al., 1987; Freeman-Longo, 1985; Groth, Longo, & McFadin, 1982).

This finding is based on perpetrator self-report, a promising method of obtaining offense histories. Intuitively, it seems unlikely that anyone would disclose illegal acts that have gone undetected. However, when individuals know that the information is obtained anonymously or held confidential from legal authorities, self-report has often proved to yield valid measures, initially with juvenile delinquents, and more recently, with adults. Several methods have been used to ascertain the validity of self-reported criminal activity: (a) official record checks to see whether documented arrests and convictions are self-reported (Erickson & Empey, 1963; Gibson, Morrison, & West, 1970; Hardt & Peterson-Hardt, 1977; Hirschi, Hindelang, & Weiss, 1980; Reiss & Rhodes, 1961); (b) the known group method that examines self-reports of two or more groups that can be expected to differ in criminal activity (Erickson & Empey, 1963; Farrington, 1973; Hirschi, Hindelang, & Weiss, 1980); (c) comparison of self-report with reports from peer informants (Gold, 1966, 1970) or treatment staff (Jones, Weinrott, & Howard, 1981); (d) polygraph examinations of respondents answering self-report questions (Clark & Tifft, 1966); (e) retest stability of self-report results (Dentler & Monroe, 1961; Farrington, 1973); and (f) lie scales or internal consistency within self-reports (Clark & Tifft, 1966; Hardt & Peterson-Hardt, 1977; Nye & Short, 1957). Based on these studies, the criticism that large numbers of offenders will either under- or overreport criminal behavior appears to be false.

Following the pioneering efforts of Porterfield (1946) and Wallerstein and Wyle (1947), favorable psychometric appraisal of delinquency self-report inventories has resulted in their widespread use in epidemiological and etiological studies (Elliott, Huizinga, & Ageton, 1985; Erickson, Gibbs, & Jensen, 1977; Farrington, 1973; Gold, 1966; Mann, Friedman, & Friedman, 1976; Nye & Short, 1957; Patterson, Capaldi, & Bank, in press). The technique has subsequently been applied to evaluation of legal dispositions (Dunfod, Osgood, & Weichselbaum, 1982; Lincoln, Teilmann, Klein, & Labin, 1977) and treatment programs (Jones, Weinrott, & Howard, 1981; Weinrott, Jones, & Howard, 1982).

Three self-report studies of adult sex offenders have all shown a much higher frequency of sex crime than might ordinarily be predicted on the basis of official records. Broth, Longo, and McFadin (1982) surveyed 83 rapists and 54 child molesters, all of whom were incarcerated. Responding to a brief, anonymous questionnaire, the rapists admitted to a mean of 5.2 rapes per man as compared to only 2.8 that were documented. The average child molester had been convicted only once, yet the self-reported mean was 4.7 sexual assaults per man. For reasons that are not well explicated, the 9 subjects who self-reported the highest frequency of sexual assault were omitted from the group summary. Therefore, the discrepancy between known and unknown offenses may actually have been higher.

Using the same data collection procedure, Freeman-Longo (1985) obtained self-reports from 23 rapists and 30 child molesters in an institutional forensic mental health program. For the rapists, the total number of arrests for a

sex crime was 48, or about 2 per man. The same men reported a total of 5,090 sex crimes (or about 221 per man), including 319 child molestations and 178 rapes. The child molesters averaged about 1.5 arrests per man whereas their self-reports yielded over 20,000 sex offenses, including nearly 6,000 sexual assaults of children and a surprising 213 rapes of adult females.

In the most comprehensive self-report study to date, Abel et al. (1987) assessed 561 mixed sex offenders who had "voluntarily" sought evaluation or treatment at two outpatient psychiatric clinics. Structured clinical interviews of 1-5 hours followed presentation of a videotape on confidentiality safeguards. As in the aforementioned studies, questions were confined solely to sexual misconduct. Over a quarter-million sex offenses were reported, with 23.5% of these involving direct physical contact with a victim. There were over 900 rapes disclosed by 126 self-described rapists. The mean number of rapes (and victims) was about 7 per man, and the median was 1. The 371 self-avowed child molesters (some of whom admitted to rape as well) confessed to 38,671 acts involving illicit contact. The mean number of victims was 150.2 for nonincest homosexual pedophiles, 19.8 for nonincest heterosexual pedophiles, and about 1.8 for incest offenders. The corresponding medians were 4.4, 1.3, and 1.3. The investigators found that the probability of being arrested for a sex crime that included touching was only about 3%.

The present research differs from other self-report studies of sex offenders in several important respects. First, it employees an automated interview rather than a personal interview with a researcher, Binik, Westbury, and Servan-Schreiber (1989) have shown that individuals

may be more willing to disclose sensitive sexual information when interviewed by a computer than in face-to-face situations. Ultimately, some variation of the interview might constitute a useful criterion measure for evaluating sex offender treatment programs because reliance on official recidivism measures is replete with flaws (Furby, Weinrott, & Blackshaw, 1989). Second, an attempt was made to incorporate modest validity checks. Other surveys of sex offenders have failed to appraise the psychometric integrity of the measures extracted from their questionnaires or interviews. Third, it sought information on both sex and nonsex offenses. Fourth, inquiries were made about the use of force, weapons, and substance abuse in connection with sex offenses. Finally, the present study critically examined the common practice of classifying sex offenders on the basis of their commitment (or instant) offense, given that those who have committed multiple types of sex offenses might be more the rule than the exception (Able et al., 1987).

* * *

Presenter:

Detective Sergeant Craig Hill
Supervisor of Criminal Investigations
Leawood, Kansas Police Department

President: The Lost Child Network
National Child Resource Center
Dedicated to the Education, Awareness, and Recovery of Children Victimized by Criminal Abduction and Sexual Exploitation.

Age: 44 Years of Service: 24

I extend my warmest thanks to all of the members of this committee for allowing me to make this presentation.

I appear before you today as police officer with over 24 years of service, and as the President and Co-founder of a Nationally recognize [sic] Child Resource Center. Unfortunately, I have experienced the devastation of Criminal Sexual Assault, Rape, Sodomy, and Murder in recent investigations such as Stephanie Rene Schimdt, and through my involvement with the Polly Klaas, Sara Wood, Andre Parsons and Stephanie Crane cases.

Each tragedy destroyed the lives of entire families . . . and in each case the suspect was a paroled sex offender.

Every year many Kansans are forced to face the fear that when a son or daughter disappears, they might never see their children again. We all spend our lives teaching our families not to be afraid . . . , only to be careful. ***But being careful is not working.*** Unfortunately we live in frightening times. We educate our children to beware of those individuals that prey upon them, posing as teachers, day

care center operators, scout leaders, or religious counselors. These pedophiles infest our communities looking for the opportunity to sexually assault a child.

They are organized, they have legal representation, and many pedophile organizations such as NAMBLIA or the RENE GUYON SOCIETY have turn [sic] to lobbyist [sic] in an effort to convince the Legislators in some states, to reduce the age limits for legal consent.

How, as a society, are we to react when one of our children is raped or sodomized by someone they've learned to trust?

What can I say to a parent after telling them a man confessed to sodomizing each of their six children?

How do I convince them to allow our legal system to take responsibility when they learn the same man was released after raping another child at gun point?

How do I convince myself to trust the justice system when I've entered our court rooms only to try the technicalities and not the truth?

How, as a professional law enforcement officer, can I accept the parole of a convicted sexual offender who has acknowledge [sic] their sickness is controlling them . . . even thought [sic] they may want to change?

Our wives and daughters have found it necessary to adjust their lives in order to deal with the high risk of sexual assault . . . vicious confrontations with individuals who do not see punishment as a deterrent . . . individuals who have confessed that their only motivation was for the lust . . . control . . . greed . . . or violence.

Many blame their childhood. Others blame society. Donald Giddeon blamed you and I . . . the State . . . for pushing him out into a lifestyle he wanted no part of. It is time that Kansas takes a stand and we realize that as law makers, and law enforcers, it is our responsibility to protect the citizens of this State. No longer can we succumb to organizations who think that the rights of a convicted sex offender's should be equal to a Pittsburg State College student's . . . right to live.

Across this great nation, State Governments are taking the necessary steps to stop this epidemic . . .

The California State Department of Justice implemented the Serious Habitual Offender Program in ten San Francisco Bay Counties. It was a program that coordinated the communication between criminal justice agencies in the identification, investigation, apprehension and prosecution for habitual sex offenders. That was later expanded to state wide and signed into law. (1989 – October 2nd, 1992.)

The State of Oregon passed child sexual abuse legislation that required any employee in a child service occupation to first have a Federal background check. (1991)

Minnesota past [sic] a law requiring state registration of felons who have committed sexual crimes against children. (1991)

And in Washington State, a sexual predator act has been upheld as constitution, [sic] including civil commitment. A law designed to protect the innocent from repeat offenders.

With that in mind, let me refer to the statement made by Walter Fisher on national television after admitting to sexually assaulting between two and three thousand children over a period of ten years . . .

"I will always have that urge".

Affecting only the violent sexual offenders, this new law is a [sic] opportunity to promote the safety of all Kansans. It will provide the legal system with the ability to control individuals inflicted with this unexplainable sickness, while reducing the populations exposure to repeated sex offenders.

Ladies and gentlemen we can join together with other states in taking this stand. We can make progress in a time when some feel there is little hope . . . because of all the drugs, . . . gangs, . . . hate, . . . and violence.

No longer should Kansans be force [sic] to live in fear . . .

We can show the people of this great State that we have the courage to put an end to this sinceless [sic] violence . . .

Courage is not the absence of fear . . . but the ability to carry on with confidence in spite of it.

Ladies and gentlemen, I have confidence in you.

THE SENATE JUDICIARY COMMITTEE

TESTIMONY BY JIM BLAUFUSS FOR SENATE BILL 525
(The Sexual Predator Act)

The most effective way to protect women and children from sex offenders is to send them to prison for the rest of their life. At this time a life sentence without parole is not possible.

This Sexual Predator Bill is a reasonable solution that can be used to stop rapists and pedophiles from destroying the lives of women and children. I do not believe anyone is willing to sacrifice a loved one in the hope that a sex offender should have another chance to start a new life.

These are sex felons who have already destroyed the lives of their victims. Sex offenders are a unique group of criminals who prey on women and children. There is no known treatment that will change the behavior of these violent felons.

Pedophiles and rapists can only be stopped by the State of Kansas. These people can not be stopped by their victims, they can not be stopped by their own families and they can not stop themselves.

Most sexual assaults have no witnesses and there is little or no evidence that can be used to get a conviction. How does a person prove rape? Some people tell women to not fight. Submitting to the attack might help their chances of living. In a trial, the jury wants to see photos of a badly bruised body or a dead body. If Stephanie Schmidt, killed in July by Donald Gideon, had lived, how would she have been able to prove that she had been raped?

Most victims do not report a rape. They do not dial 911. We are talking about a crime so heinous that the victims do not want anyone to know it happened and sometimes would rather be dead than live with the memory of the attack. During the sentencing hearing for Gideon, his attorney said the State of Kansas does not consider rape and sodomy, as doing great bodily harm. The harm done to a victims mind and soul by a rape is far greater than any physical harm.

The Schmidt Task Force, formed by Stephanie's parents, Gene and Peggy Schmidt, found there are many sex offender treatment programs. This task force did not find a single treatment program that is effective. The fact that the State wants to spend money on these programs sends a false message that somehow there is a solution that the citizens of this state can feel secure.

We teach our children to not trust strangers. Most assaults are by men known by their victims. Most sex offenders repeat their crimes until they are caught. The only way to stop them, is to lock them up and keep them from the people they will hurt. The rapes and murders involving sexual assaults that we see on the news daily are usually committed by men with a sex felony record.

Statistics show there will be 50 sexual assaults for every conviction. The cost of letting these people go free is much greater than locking them in prison. We were told the reason this bill did not pass two years ago was money. This bill could save money and lives. Repeat offenders go through our court system over and over at a great cost to taxpayers. Many times the taxpayers are

paying for the prosecution and the public defender, such as the case of Donald Gideon.

Because there is no effective treatment for sex offenders, this Bill may mean a life sentence for a felon that is considered a risk to women and children. SO BE IT! This Bill may cause some hardship for the convicted sex felon, but we know their many victims will live with the effects of the attack the rest of their lives.

The most common statement we have heard from rape victims is: "I wish I could be the person I was before this happened to me".

The Schmidts and I have had many visits with members of the current Parole Board. They all agree that everything possible should be done to keep these people off our streets. We know it is not possible to keep all sex offenders locked in prison, but this Bill will go a long way toward making Kansas a safer place for women and children.

Jim Blaufuss
Member of the Schmidt Task Force

/s/ Jim Blaufuss

7919 Westgate Ct.
Lenexa, Kansas 66215

913-492-6801

[LOGO] KANSAS AMI
Kansas Alliance For The Mentally Ill

112 S.W. 6th, Ste. 305 • P.O. Box 675
Topeka, Kansas 66601
913-233-0755

Testimony on SB525
February 23, 1994

My name is Howard Snyder, and I live in Prairie Village. I am speaking today on behalf of the Kansas Alliance for the Mentally Ill, a state wide organization of families and friends of Kansans who suffer from mental illness.

It should be stated up frot [sic] we strongly support the "why" behind HB 525. It addresses a problem that must be solved. But we are in opposition, yes even in shock, at the "how". On page 4, line 27, it states that these very dangerous people are to be turned over to the custody of the secretary of SRS to be held in a secure facility. There is no definition of a "secure facility", so it is conceivable that a secure facility could be any one of the state psychiatric hospitals. This means that these people could be mixed in with our very vulnerable mentally ill family members. This is like putting the fox in the hen house.

I have a 34 year old son who suffers from Schizophrenia, which is a no-fault nonecureable brain disease. From time to time, for the rest of his life he may require hospitalization as his symptoms recur. As a poor person with a pre-existing lifetime disease, he is uninsurable in the private system, therefore, he will only have access to the state hospitals. I do not want (nor do you) my son raped by a dangerous sexual predator who has been placed in a state hospital because of SB525.

We already have in front of us the tragedy of the young staff member at Topeka State who was murdered by a dangerous person who had been placed in the general hospital population after the closing of the Awle unit two years ago. We in Kansas AMI stated publically it was not right to expose the ill people in Topeka State to those dangerous persons. We were told that everything would be alright, and now we all have to live with the consequences. Have you forgotten so soon? The bill should be revised to require that sex offenders be held in a facility away from all state hospitals, preferably by the Department of Correction [sic] which has the facilities and the expertise for holding long term high security inmates.

Another major concern of the families and friends of those Kansans who suffer from mental illness is financial. What is the cost? Where is the fiscal note? We understand that the cost has been estimated at $8 million for the first year, but we have seen nothing in writing.

We understand that the experience in other states has been that only a few sex offenders respond to treatment (the treatment technology in this area is primitive), and that those only responded after very long term very expensive treatment. Page 7, line 3 states that the secretary of SRS is responsible for *all* cost of evaluation and treatment of offenders in custody. Where does the money come from for this new responsibility?

Unless new funds are made available, the new responsibility can only be paid for from existing SRS or DOC funds. If paid from the SRS budget, then it will be paid for by a few – those whose SRS services are cut. If the general population is pushing SB525 then that's who

should pay for it. Any dilution of services to the mentally ill to pay for sex offenders is the equivalent of a selective tax on disabled Kansans who are already poor. What has my disabled son done to be saddled with the cost of providing care to a sexual predator?

In conclusion, consider this. The way SB525 is written, my son is put at risk of being the victim of a sexual predator while he is hospitalized, and having to pay for the predator to be there to prey on him.

Howard W. Snyder

[LOGO] SOUTHWEST GUIDANCE CENTER
333 West 15th, Box 2945 Liberal, KS 67905-2945
624-8171

Jim Karlan, Executive Director
Joe Bridenburg, President of the Board

Presentation by: James Karlan, RMLP, CMHA
Executive Director
Southwest Guidance Center
P.O. Box 2945
Liberal, Kansas 67905-2945
(316) 624-3171

Subject: S.B. 525:

My name is James Karlan. For 11 1/2 years, I have been the Executive Director of the Southwest Guidance Center (SWGC), a four county community mental health center located in Southwestern Kansas. For over 9 years, SWGC has operated a Sex Offender Treatment Program (SOTP).

There are currently fifteen offenders in the program. The duration of the program is five years.

I am here today to oppose the letter but not the spirit of S.B. 525. I believe that the goal of S.B. 525, as I understand it, is laudable: that is, the effective monitoring and treatment of sex offenders so that the citizens of Kansas can experience a high degree of safety and security within their respective communities.

In my opinion this well intentioned piece of legislation will not, in its current form, achieve the objective for which it is intended.

During the first year of SOTP at the Center, Center Staff were accused by some people in our community of being "bleeding hearts." Rather than being "soft" on sex offenders, I have found it rather ironic that the staff of the Southwest Guidance Center have been harder on and more consistent in their treatment of sex offenders over the past nine years than most of the courts, county attorneys, parole officers, and community corrections personnel, with whom the Center has associated during the history of the Center's SOTP. I have experienced within many of the systems that deal with sex offenders a sense of powerlessness, confusion, and even cynicism which has led many individuals to take a politically correct stance about sex offenders verbally while effectively feeling impotent about positively addressing the issue. This piece of legislation, in its present form, will, in my opinion, give the illusion of addressing the issue while actually allowing the overall system to continue doing "business as usual" with a few financially costly cosmetic changes.

Even more important than the potential diversion of millions of dollars from the development of services in the community for the mentally ill to the warehousing of sex offenders within the mental health system in inpatient hospitals is my firm conviction that this legislation will not make the communities of the State of Kansas appreciably safer.

I would now like to address two major points of concern which I have with regard to S.B. 525:

First, in Section 3 of the proposed legislation, the defined role of the county attorney of the county in which the sex offender has been convicted is permissive and unrealistic. I am concerned that most county attorneys would not involve themselves in such a process unless there were a public outcry because of a particularly heinous crime which has been earlier perpetrated by the particular sex offender in question. The cost in time and money that it would take to file a petition for evaluation and to carry out the subsequent trial to determine if the former offender were still a sexually violent perpetrator would cause most county attorneys to quietly ignore the issue unless forced by local circumstances to do otherwise.

On the other, if Section 3 were enforced and a person about to come out of prison were tried and found to be a sexually violent predator (under the Section 2 definition), that person would be placed in a state inpatient psychiatric hospital under the care of the Department of Social and Rehabilitation Services (SRS). The offender would remain there until . . . "the secretary of the department of social and rehabilitation services determines that the person's mental abnormality or personality disorder has so

changed that the person is not likely to commit predatory acts of sexual violence if released."

Recognizing the potential for a lawsuit should such an offender be released from a mental health inpatient facility and then perpetrate a sexual crime on another victim, no psychiatrist working in a state inpatient hospital will certify that someone in his or her care has essentially been "cured" of being a sexually violent predator as defined in Section 2 and recommend the offender's release into the community. As a result, state inpatient mental health facilities will begin to warehouse offenders. This will lead to at least three negative outcomes: First, the financial cost to the citizens of Kansas to warehouse these individuals will skyrocket. Second, no effective treatment will be available in the community for those less violent sex offenders who could have been treated there instead of being incarcerated; and third, state psychiatric hospitals will essentially be turned into prisons, to the detriment of the mentally ill patients within the facilities who are not sexually violent predators.

It is my opinion that Section 3 should be amended so that inpatient treatment of sexually violent predators remains within the Department of Corrections. In addition to clinical and financial considerations, there is the issue of *defacto* decriminalization of a sex offender's crimes once the offender is made the responsibility of the mental health system.

The second issue which I would like to raise today regards S.B. 525's definition of a "sexually violent offense" as contained in Section 2. I will also suggest an

alternative to incarceration for first time offenders of certain sexual crimes.

The definition of "sexually violent offense" contained in S.B. 525 does not recognize that there are subpopulations of sex offenders. The crime of rape, an obvious act of violence, is equated with incest. Pedophilia, a crime in which individuals prey on children and have children as their main object of sexual desire, is also equated with incest and other sexual crimes.

In my opinion, rapists and pedophiles should not be treated initially in the community but in a correctional facility. As part of their parole, they should be required to participate in an appropriate community based sex offender program for five years. Should they be violated from the community program, they should immediately be re-incarcerated in a correctional facility.

As for other felony sex offenders, including incest offenders, the issue should be to determine which of these felony sex offenders are treatable in the community and which are not. I offer the following as possible criteria for making such a determination:

1.) The sex offender must not have used physical violence or the threat of physical violence in the commission of his/her crime.

2.) The sex offender must demonstrate the he/she is sincerely motivated for treatment by admitting the offense and pleading guilty. Pleading "not guilty" or "no contest" and then requesting admittance to an outpatient program once one is found guilty is an indicator of low

motivation and leaves a very poor prognosis for successful outpatient treatment.

3.) The sex offender must never have been incarcerated in a correctional facility prior to his/her arrest as a sex offender. Prior incarceration makes successful treatment of the individual in the community problematical.

4.) During the pre-sentence investigation, the sex offender must undergo a thorough psychological evaluation following his conviction as a felon. At this time the courts would be informed whether the sex offender is considered treatable in the community.

5.) The sex offender must then enter a community program of five years duration. The offender will be sentenced to the program with the understanding that, should he/she be violated out of the program by program staff, he/she will be immediately incarcerated in a correctional facility.

6.) The sex offender will pay for his/her treatment. This is not just a financial issues [sic]. It is a well-established fact at our Center that a lack of willingness to pay for such treatment indicates the offender's lack of commitment or even open resistance to invest himself/herself in "working the program."

In closing, I would like to reiterate my support for an appropriate, effective piece of legislation regarding the treatment of all sex offenders, be they violent at the present time or not.

If the citizens of Kansas are truly serious about addressing this issue, they will empower their governmental officials to develop both inpatient and outpatient services

for sex offenders. Those who are truly dangerous should be kept in a correctional facility and receive treatment there for as long as is necessary. First-time sex offenders other than rapists and pedophiles who are evaluated after being convicted and are found to be treatable on an outpatient basis under strict program conditions should be treated a minimum of five years, with the understanding that they will be incarcerated in a correctional facility should they not work the program.

Now for the part that no one likes to talk about: money. The political will of the people and their elected governmental officials on this issue will be measured by the extent to which they are willing to fund the creation and maintenance of quality inpatient and outpatient services for sex offenders. Last year the treatment of approximately 15 sex offenders at our Center cost $89,000. Revenues totaled just over $15,000. In one year, the Center experienced a deficit of $74,000 in this one program alone. Even though the Center is dedicated to providing SOTP as a community service, we will not be able to continue SOTP for very long without additional financial support.

I thank you, ladies and gentlemen, for allowing me to give testimony today. I will be happy at this time to answer any questions you have.

TESTIMONY
FOR
SENATE BILL 525

by
Walter Thiessen, LSCSW
C.M.H.C. Director
Prairie View, Inc.
Newton, Kansas 67114

TESTIMONY FOR SENATE BILL 525

As the director of the Community Mental Health Division of Prairie View Inc., in Newton, Kansas, I applaud your efforts in trying to deal with this very difficult issue of sex offenders. As a representative from a provider of mental health services to sex offenders in the community, I support the testimony that has been provided by the Association of Community Mental Health Centers in opposition to the passage of Senate Bill 525. We at Prairie View have had an intensive outpatient sex offender treatment program for almost ten years. Several of our staff have had extensive training in this area and we are concerned about what we see happening in our society. We are as concerned as you are for the safety in our communities. We believe, however, that this bill does not go far enough in dealing with the larger problems related to sex offenders. This bill, in some ways, just deals with the tip of the iceberg.

Staff at Prairie View have been working with other outpatient providers in the area to look at the whole issue of treatment of sex offenders. We have identified many problems that I believe you the legislature could help address. Our society is needing to spend more and more resources in dealing with this problem, not only in the incarceration of the offender, but also in the treatment of the victims of these offenses. It is our belief that a more comprehensive approach needs to be developed by the State to respond to this crisis.

THIS APPROACH SHOULD ADDRESS THE FOLLOWING:

1) Prevention and education.
2) A systematic process by which persons who have sexually offended are evaluated, tested, and screened for appropriate treatment settings.
3) A comprehensive and coordinated array of treatment options be available across the State for this population, both outside and inside prisons.
4) A set of criteria and protocol be established that providers would need to meet in order to assure competency and quality in the treatment programs.
5) A clear understanding of responsibilities between the Department of Corrections and treatment providers to assure the safety of the community.
6) For persons who are evaluated and found to be "a sexually violent predator", that they

be maintained in a secure setting that has been developed as part of the comprehensive plan.

Research indicates that most offenders where also victims of sexual crimes. If we, as a society, are unable to address this issue in a comprehensive manner, we will continue to create more victims and increase the number of offenders. My recommendation is that the Department of Corrections work together with treatment providers across the State to develop a comprehensive plan in dealing with sex offenders. It is only in this way, that we will begin to deal with this growing problem in our society. We at Prairie View, along with other community mental health centers, would be very interested in working with the Department of Corrections in developing such a plan.

Thank you for your time and your commitment to dealing with this very difficult issue.

/s/ Walter Thiessen LSCSW
Walter Thiessen, Director
Community Mental Health Center

State Of Kansas
Tenth Judicial District

Office Of District Attorney

Paul J. Morrison
District Attorney

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913-782-5000, Ext. 5333

COMMENTS TO THE SENATE JUDICIARY COMMITTEE
Re: Senate Bill No. 525

I welcome the opportunity to speak with you this morning about a piece of legislation you are considering, the Sexually Violent Predator Act, that will place the State of Kansas on the cutting edge in terms of dealing with offenders whose behavior has devastating and far-reaching effects. It is estimated that 1 in 3 girls and 1 in 10 boys will be sexually victimized by age 18, and that 1 in 4 woman [sic] will be sexually assaulted in their lifetime. According to the Governor's Task Force on Community Protection, the immediate monetary impact of responding to a single case of child sexual abuse is estimated to be about $183,00, [sic] including medical and psychological care for the victim, the investigative and court expenses and the cost of incarceration, supervision or rehabilitation of the offender (Prentky and Burgess, 1989). As illustrated, the serious cost of interpersonal violence is enormous. And those cost [sic] reflect cases in which victims survive.

When considering the passage of this bill, it may be helpful to look at the numbers of inmates this act would effect. As of August, 1993, the Kansas Department of Corrections had a total inmate population of 6,259. Of

that total, 1,091 of those inmates were serving controlling [sic] a minimum sentence for a sex offense. During fiscal year 1989, 138 sex offenders were released on parole or conditional release. One might extrapolate that in a three year period, there could be a total of approximately 450 inmates who would be released and considered under this act. Now, let's compare that number with the number reviewed in Washington since the inception of their Sexually Violent Predator Act. Since their law was enacted in July of 1990, approximately 2,000 inmates have been referred for screening. Of that total, 17 met the definition of a sexually violent predator and have been placed in a secure treatment facility, 6 are awaiting trial for determination as to their status as a predator, and 6 are currently undergoing evaluation. It is apparent when examining the numbers that Washington have reviewed and mandated treatment for that the numbers of persons who will be swept up in the net created by this law will be very small.

What kinds of offenders will, indeed, be caught up in this net? Although the numbers may be small, the damage done by these few individuals is tremendous. Consider Alvin Gaines, an offender that was convicted of kidnapping, raping, and sodomizing a 14 year old girl who was walking through her neighborhood late at night. A burglar by trade, Gaines was also an opportunist who is suspected of committing several other sexual assaults in communities throughout Johnson County. Consider, too, Robert Philippi. Convicted twice in Missouri for kidnapping and sex crimes, he was recently sentenced in Johnson County for kidnapping and aggravated robbery, a set of circumstances in which he again preyed on a woman

as his victim. Currently being prosecuted in my jurisdiction is another predator who, having been convicted of prior sex offenses against two other woman [sic] who he selected at random, has been charged with attempted rape, attempted aggravated criminal sodomy, and kidnapping. And finally consider Kenneth Hay. He is currently serving time in a Kansas State Correctional facility for luring small girls to his automobile and masturbating in front of them.

What do all of these offenders have in common? Without a doubt, it is safe to say that, although some of them have prior criminal history which can be verified, we have no way of knowing how many people each predator has victimized. In a study conducted by Gene Abel and staff at the New York State Psychiatric Institute's Sexual behavior Clinic, they found that the number of sex offenses reported were significantly higher that [sic] the numbers reported to officials or in official statistics. In this study, the sample of 411 paraphiliacs (a term which refers to sex offenders who have compulsive thoughts and urges to carry out sexually aggressive behaviors) attempted 238,711 sex crimes and completed 218,900 of them. This included nuisance and other low-level types of sex offenses. On the average, each offender attempted 581 crimes. As an example, although we were able to identify 8 girls who were old enough to testify in the Hay case, how many other children may have been victimized and the act went unreported.

The offenders we are referring to are a small but highly dangerous population of sex offenders who will reoffend when released back out into the community. Just as an alcoholic is never "cured", but must continue to fight the

battle of his/her addiction, so, too, is it for the sexually violent predator. Where, in our communities, can these persons be placed that they will not have access to woman [sic] and children? If you isolate these individuals in a treatment facility that will address their needs you are also addressing the needs of each of our communities, by ensuring that they will be safe from individuals who will victimize again. To wait until the offenses have stacked up against an individual to the point that they will be incarcerated until they are old is to allow the numbers of victims, the amount of destruction to stack up as well. That cost is simply too great.

Lynn Stemm
Victim Assistance Coordinator

[LOGO]

WASHBURN UNIVERSITY

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February 19, 1994

Senator Robert Vancrum
Statehouse
Topeka, KS

Re: SB 525

Dear Senator Vancrum:

I have received, through Gordon Self, your request that I review SB 525 and am pleased to do so. I understand the bill is scheduled to be heard on Tuesday and

Wednesday of this week at 10:00 AM. It would be very difficult for me to appear at either of those times, although I would certainly attempt to arrange it if it seemed absolutely necessary. Since my comments contained herein are more in the nature of technical review than advocacy either way, I suspect they should suffice (and thus save your time in the hearings, too!). I will add, however, as I said at hearings on SB 18 two years ago, that I see nothing generally inappropriate in this legislation, and feel it is well within the legislature's constitutional authority from both a substantive and procedural examination. Since the hearings on SB 18, as you know, the Washington Supreme Court has upheld that state's sexual predator law against both substantive and procedural constitutional challenges. *In re Young*, 857 P.2d 989, is a well reasoned and thorough opinion and provides strong support for the proposed Kansas legislation, which is identical in most respects to the Washington law.

COMMENTARY:

1. In Section 1, at lines 30 through 38, reference is made to the inappropriateness of the Kansas treatment act in application to sexually violent predators, since such persons would not have the opportunity to "engage in an overt act during confinement as required by the treatment act for mentally ill persons. . . . ". This language comes from the Washington act. Our treatment act, however, unlike Washington's, has not been interpreted to require a recent overt act to support a finding of liklihood [sic] of harm. See *In re Treatment of Albright*, 17 KA2d 135 (1992). The sentence beginning on line 30 and concluding on line 38 should be deleted, since it doesn't provide a

legally valid reason for the legislation. In my opinion the legislative finding of necessity in section 1 is sufficient without it.

2. Section 3 requires the agency with jurisdiction to give three months notice prior to the anticipated release of a person who may meet the criteria of a sexually violent predator to the prosecuting attorney of the county in which that person was originally charged. Except in the case of a person serving a sentence on conviction, however, the agency with jurisdiction probably would not know that far in advance. An alternative would be to provide that the agency give immediate notice at any time that the agency has knowledge of a scheduled event which could result in the release of the person within three months. An "event", of course, could be a scheduled release date or, in the case of an incompetent or insanity acquittee, a scheduled hearing.

3. Section 4 is clear enough when applied to a situation arising out of a release as described in section 3. It appears that a petition could be filed with respect to a person already in the community, however. . . . someone, in fact, who may have been released some time ago. In the normal course of events, probably that person is most likely to draw attention through some new criminal act, and thus this petition procedure would be unnecessary; the matter would be dealt with in the new criminal proceeding. It is possible to imagine, however, that in a few cases it may become apparent that a former offender who has been on the "straight and narrow" for some time appears to be demonstrating a pattern of behavior that foreshadows a return to the old misconduct. In such a case the person may not even be residing in the county

where the person was formerly convicted or charged, thus the language should probably include the prosecuting attorney of the county where the person presently resides as one who may file a petition under this section. Though I'm not convinced this process requires it, I would feel more comfortable from a procedural due process point of view if the petition were required to be accompanied either by a medical statement or an explanation why the obtaining of such a statement is not possible. The added burden and cost to the state is minimal, and the added protection to the individual considerable. This is the traditional test for procedural due process (*Matthews v. Aldridge*, 424 U.S. 319).

When we start reaching back into someone's former life, it gets uncomfortable, doesn't it . . . and the farther back we reach the greater the discomfort, particularly since we know the person has been branded once the petition is filed, no matter how the hearing comes out. Perhaps it would be sound legislative judgment to set a limit. The Washington Supreme Court in *Young* required a recent overt act to satisfy due process concerns in applying these provisions to persons in the community. Our courts might do the same, but not necessarily, since they interpreted a similar civil committment [sic] statute differently in that respect (see *Albright*, above). An argument can surely be made that a person cannot be clearly adjudged risk-free until they have been in the community for some time, since they have few if any opportunities to misbehave while in confinement. Thus a post release period of (perhaps 5?) years, after which a petition could not be filed based on the prior misconduct may strengthen the statute against constitutional attack.

4. Section 5 requires an evaluation by a person "deemed to be professionally qualified to conduct such an examination". Deemed by who? Washington's statute provides for qualification under rules established by thier [sic] equivalent of our SRS. Perhaps that goes further than necessary. Transferring the person to an appropriate facility for evaluation is probably as far as the statute needs to go.

5. Section 6 provides for trial of the issue within 45 days after the filing of the petition. The Washington statute is identical, and the Washington Supreme Court held that due process and equal protection considerations required notice and an opportunity to be heard within 72 hours after the individual is taken into custody. *In re Young*, supra. Under the Kansas Treatment Act, a person facing involuntary hospitalization is entitled to an *adversary* probable cause hearing not later than 5:00 PM on the second full day following the filing of an application for determination of a mentally ill person. K.S.A. 59-2912. Placing a similar requirement in section 5 of SB 525, following the initial *ex parte* determination of probable cause by the judge, would strengthen the statute in this regard. It could possibly be argued that the 45 day period before trial is too long, since the full hearing under the Kansas Treatment Act must come within 7-14 days following the filing of an application for determination. I believe the difference can be justified, however, if it can be shown that the longer period is reasonably necessary for the evaluation required. That, of course, is a question for medical expertise.

6. Section 6 provides for a jury trial upon demand, but does not establish the nature of the jury, or the

required vote. I would suggest the addition of the following sentences at the end of section 6: *Demand for jury trial shall be filed, in writing, at least four days prior to trial. Number and selection of jurors shall be determined as provided in K.S.A. 59-2917.* This would provide for a jury of six, as in civil committment.

7. Sections 8 and 10 contain the substance of the Washington statutes 71.09.070 and 71.09.090, but have been rearranged in a manner that, to me, makes them difficult to follow. In part this is so, I think, because in section 8 there seems to be an assumption that the annual review is a hearing, when in fact it is not *unless* a petition for discharge is filed, or a waiver of rights is not filed. I believe the statute will be much clearer if everything is stricken from section 8 following the word "act" on line 23 of page 5, and then section 10 is completely replaced by the language of section 71.09.090 of the Washington act, with the following changes:

a) The reference to secretary of the department of social and health services should be changed to our terminology – secretary of SRS;

b) The Washington statute sets 45 days as the time within which a hearing on a petition for release authorized by the secretary must be held, and sets no time frame for a hearing where no waiver of rights is filed with the annual report. Some statutory time frame is necessary, and 45 days seems longer than can be justified, since in this situation there should be no need for an evaluation since the individual is and has been in treatment for this condition. Under the Kansas Treatment Act, where a request for hearing is filed in connection with the

required semi-annual review, the hearing on whether the patient continues to be a mentally ill person must be held within 10 days. It would appear difficult to justify a longer delay under the current proposal.

Thank you for the opportunity to review SB 525. I hope my comments will be in some degree helpful.

Very truly yours,

/s/ Raymond L. Spring
Raymond L. Spring
Distinguished Professor

RLS/rs

AMERICAN CIVIL LIBERTIES UNION
OF KANSAS AND WESTERN MISSOURI
706 West 42nd Street, Kansas City, Missouri 64111
(816) 756-3113

Testimony in Opposition to SB 525
Senate Judiciary Committee, Hon. Jerry Moran, Chair
Submitted Tuesday, February 22, 1994
by Carla Dugger, Associate Director

The American Civil Liberties Union of Kansas opposes SB 525 for the following reasons:

– The bill establishes a procedure for civil commitment for sexually violent offenders, and in so doing violates the entire fundamental constitutional protections of due process and proof of evidence required that is beyond a reasonable doubt.

– The American right to due process is dependent on proof of *past* conduct, not possible future conduct.

– Under this legislation, a jury would be asked, in effect, to lock up persons because they fear them. Please consider what outrages could be committed by such juries. Isn't it likely that any person of color will be feared by the average jury regardless of the "evidence?"

– Although the bill attempts to construct an illusion of due process by allowing trial by jury, et al., the basic premise of the bill is seriously flawed. It calls for jury determination of two very vague possibilities of future behavior – first, that the petitioner is not safe enough to be left at large, and second, if that person is discharged, they are likely to commit a sexually violent act.

– Civil commitment should be imposed only if there is imminent danger to the petitioner himself (or herself) and to others. Vague preditions [sic] of future possibilities are tantamount to soothsaying, and deserve no validity under the law.

– If a rapist is dangerous enough to deserve such lengthy incarceration, it would be more constitutional to ensure this through the criminal process itself, not through an additional civil commitment procedure.

Approved: 3/15/94
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 3:00 p.m. on February 24, 1994 in Room 254-E of the Capitol.

All members were present.

Committee staff present: Mike Heim, Legislative Research Department
Gordon Self, Revisor of Statutes
Darlene Thomas, Committee Secretary

Conferees appearing before the committee:

Ellen Piekalkiewiez, Association of Community Mutual Health Center
Terry Larson, Kansas Mental Health Coalition
Randy Proctor, Director Mental Health, Department of Social and Rehabilitation Services
Beverly L. Baker, County Clerk, Johnson County
Anne Smith, Kansas Association of Counties
Marjory Scheufler, Edwards County Commissioner and Member of the Advisory Committee on Juvenile Offender Programs
Julene L. Miller, Deputy Attorney General, State of Kansas
Dennis Jones, Kearny County Attorney, Southwest Kansas Juvenile Detention Facility Board of Advisors
Sue W. Lockett, Chairman of Advisory Committee on Juvenile Offender Programs
Linda Wood, Financial Analyst, Kansas Development Finance Authority

Carelyn Hill, Department of Social and Rehabilitation Services
T.C. Anderson, Kansas Society of Certified Public Accountants
Richard H. Mason, Kansas Trial Lawyers Association
Trudy Aron, American Institute of Architects
George Barbee, Kansas Consulting Engineers
Richard H. Mason, Kansas Trial Lawyers Association
Clifford Hacker, Sheriff of Lyon County
Lisa Moots, Kansas Sentencing Commission
Jim Coder, Kansas State Fire Marshal Department
W. Kent Harris, Fire Marshal, City of Olathe

Others attending: See attached list

SB 666 – fraudulent representation on employment application

SB 667 – inmates sentenced to custody of secretary

SB 525 – sexually violent offense

Randy Proctor, Director of Mental Health, Department of Social and Rehabilitation Services testified as an opponent to *SB 525 (Attachment No. 1).*

Ellen Piekalkiewiez, Association of Community Mutual Health Center provided written testimony in opposition to *SB 525 (Attachment No. 2).*

Terry Larson, Kansas Alliance for the Mentally Ill testified in opposition to *SB 525* and provided written testimony (*Attachment No. 3).*

SB 753 – public official or agency who discloses information protected from criminal liability under certain circumstances

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TESTIMONY ON S.B. 525

PRESENTED TO:

1994 SENATE JUDICIARY COMMITTEE

PRESENTED BY:

RANDY PROCTOR, DIRECTOR
SRS MENTAL HEALTH SERVICES

ON BEHALF OF:

DONNA L. WHITEMAN, SECRETARY
SOCIAL AND REHABILITATION SERVICES

SRS Mission Statement

"The Kansas Department of Social and Rehabilitation Services empowers individuals and families to achieve and sustain independence and to participate in the rights, responsibilities and benefits of fullcitizenship by creating conditions and opportunities for change, by advocating for human dignity and worth, and by providing care, safety and support in collaboration with others."

Testimony on S.B. 525
Presented to the Senate Judiciary Committee
February 23, 1994

SRS/MHRS supports efforts to protect public safety. Kansans have a legitimate concern for safety and protection from violent sexual predatory acts. In many instances these are heinous crimes which demand severe sanctions. We hope the committee will consider a joint effort between Department of Corrections and Social and Rehabilitation Services to address this problem. This approach seems consistent with a similar law in Washington.

If civil commitment procedures are changed to accommodate the long-term care and treatment for persons determined to be sexually violent predators in a secure facility, we would recommend consideration of language similar to Washington state's law. The Washington law states: "The facility shall not be located on the grounds of any state mental facility or regional habilitation center because these institutions are insufficiently secure for this population." In Washington the Sexual Predator Program is administered and operated by the Department of Social and Health Services and is located within the Department of Corrections institutions complex. The DOC in Washington provides meals, clothing, laundry services, medical and dental services, and barber services in addition to the perimeter security.

Section 1 of S.B. 525 suggests legislative intent to very narrowly apply civil commitment procedures for the long-term care and treatment for persons determined to be sexually violent predators to those deemed to be the most dangerous. However, if the procedures outlined in S.B. 525 are more liberally implemented, the fiscal note for providing treatment and care in a secure facility could dramatically escalate in future years.

Assuming the responsibility of a new population may increase the possibility of diverting resources from the established targeted populations of adults with severe and persistent mental illness and children/adolescents with severe emotional disturbance. If this bill is enacted, SRS/MHRS recommends separate funding streams and budgets specifically targeted to this initiative.

[LOGO]
Association of Community
Mental Health Centers of Kansas, Inc.
700 SW Harrison, Suite 1420 • Topeka, Kansas 66603-3755
Phone (913) 234-4773 • Fax (913) 234-3189

Testimony on S.B. 525
Presented to the Senate Judiciary Committee
February 23, 1994

The Association of Community Mental Health Centers opposes the passage of S.B. 525 in its current form, for the following reasons:

1. S.B. 525 inappropriately decriminalizes sexual offenses, by the use of civil commitment. Civil commitment should only be used to commit individuals who are determined to be dangerous to themselves or others because of their mental illness, but who do not possess criminal intentions or malice of forethought.

2. The bill, in its current form, does not guarantee that sexual predators will be housed separately from individuals, including children, with mental illness. The safety of these most vulnerable people is not adequately assured in S.B. 525.

3. By including sexual predators under the diagnosis of mental illness, the bill further stigmatizes the mentally ill in our society.

4. The bill does nothing to truly correct the current system of sentencing and treating sexual offenders. Sexual offenders must have state-of-the-art sex offender programs while they are in prison and intensive aftercare programs once they are released in order to protect society.

5. The cost of treating sexual predators in the Department of Social and Rehabilitation Services (SRS) institutions could syphon limited resources from the truly needy. We question why the Legislature would reverse its visionary plan to reform the mental health system by "back filling" SRS institutions with dangerous sexual predators?

INTRODUCTION

Especially problematic to the mental health community about S.B. 525 is the provision which mandates that violent sexual predators be civilly committed to SRS institutions after they have served their sentences in the criminal justice system. We do not disagree that society must be protected from violent sexual offenders who are without a doubt unmanageable and dangerous people. Our position is that if an individual has committed a serious and especially violent sexual crime, they should be incarcerated for life with no possibility of parole like any other exceptionally dangerous individual. If there is a concern about safety when certain individuals are released from prison and are at large in the community, the criminal justice system should provide close supervision and intensive aftercare programs.

SAFETY OF THE MENTALLY ILL IN STATE HOSPITALS

The bill mandates that once a sexual offender is classified as a sexually violent predator they are remanded to SRS custody, to be housed in a secure facility, which is not defined in the bill. We do not believe that the bill, in its

present form, provides enough protection to patients with mental illness currently receiving treatment in the state hospitals. The Washington law, though quite similar to S.B. 525, provides greater protection for the truly mentally ill in state hospitals. The Washington law states that the facility for sexual offenders should not be located on the grounds of any state mental facility because these institutions are not sufficiently secure for violent sexual predators. We request that S.B. 525 be amended to include a provision that the facility to house sexual predators shall not be located at a state hospital but at a Department of Corrections (DOC) institution.

THE NEED TO REDESIGN CURRENT TREATMENT AND SENTENCING OF SEXUAL OFFENDERS

The current system of sentencing and treating violent sexual predators is broken. The criminal justice system currently does not accommodate the very special treatment and sentencing needs of sexual offenders. We would be very supportive of flexible sentencing guidelines which could sentence violent sexual predators for life with provisions for release if they undergo successful treatment.

The Community Mental Health Centers are ready to play a role in assisting DOC in developing more sophisticated treatment programs behind the walls for sexual offenders. Several of our centers have already been contacted to serve on a task force to redesign the DOC sexual offender program. We urge that the Legislature encourage DOC to look to models that have been developed in other states as well as Canada in redesigning the prison

sexual offender program. The treatment program must be introduced long before the expiration of the offender's active sentence. The Legislature, if truly committed, to making a difference, must fund state-of-the-art sex offender programs.

In addition, sexual offenders (in fact all offenders) who are released from prison must have aftercare programs (relapse prevention in the case of sex offenders) which should be closely monitored and enforced by DOC. There appears to be consensus that the treatment of the sex offender is never complete. Following a state-of-the-art intensive treatment program in prison, participants must continue in aftercare counseling. Payment for such aftercare should come from the offender themselves, but if they are unable to pay, DOC should be required to pay for the aftercare to ensure that the individual is receiving it.

In 1993, there were 330 individuals granted probation who had committed rape, indecent liberties with a minor, aggravated sodomy, enticement of a child, sexual battery, aggravated sexual battery, among other crimes. Based on what the Community Mental Health Centers have observed and experienced first-hand, these individuals are not receiving adequate, consistent, and monitored aftercare. It is no wonder that they re-offend. The system is broken! Let us not try to repair it with another quick fix that simply gives society the illusion that the problem of sexual offenders is solved. We should not act emotionally but in a rational and sensible way: first, redesign the sex offender program currently in force and second, introduce a comprehensive aftercare treatment program. If S.B. 525 is implemented in a similar fashion as it is in

Washington, only 30 of the 300 sexual offenders will be civilly committed every year and that will leave 300 offenders free to terrorize communities.

Sex offenders should not be treated as one heterogeneous group. It is crucial that a presentencing assessment and evaluation take place to determine both the place for and type of treatment that will be selected for a sex offender. For example, a first-time incest offender whose offense did not include acts of violence or serious threats of violence, most likely can be better treated on an outpatient basis. However, that individual must actually be sentenced to the outpatient program with the threat of incarceration in a maximum correctional facility should he not fully comply with the outpatient program guidelines. Assessments and evaluations may find that other individuals who are repeat offenders could be treated initially in an inpatient program and then slowly worked into an outpatient setting.

FISCAL IMPACT OF S.B. 525

The current provisions of S.B. 525 have the potential to strain the mental health system of which we are a partner to the state, as part of the Mental Health Reform Act of 1990, the intent of which was to downsize the state hospitals. S.B. 525 would simply be a backdoor method to achieve life of incarceration for the sexual predator, which we do not oppose. We do, however, strongly oppose the use of the mental health system as a dumping ground for these individuals either at the state hospitals or at the community level.

CONCLUSION

S.B. 525 improperly decriminalizes by, civil commitment, crimes, which are most criminal and heinous in nature. The crimes committed by violent sexual predators demand severe sanctions, best administered by the criminal justice system. We urge the Committee to consider redesigning the current sex offender programs (both in prison and after) and introduce stricter penalties; only in this way will the intended results of S.B. 525 of protecting society be realized.

(LOGO) KANSAS AMI
Kansas Alliance For The Mentally Ill

112 S.W. 6th • P.O. Box 675
Topeka, Kansas 66601
913-233-0755 • FAX 913-233-4804

Testimony

February 23, 1994

To: Senate Judiciary Committee

From: Terry Larson, Executive Director,
Kansas Alliance for the Mentally Ill &
Chair, Kansas Mental Health Coalition

RE: SB 525

No one can disagree that persons who commit sexually violent offenses ought to be removed from society. If commitment and treatment can be accomplished according to what appears to be the bill's intent, it would be difficult to oppose as long as sex offenders are *totally* segregated from the general psychiatric population.

However, with no funding earmarked to implement SB 525's provisions, we must oppose the bill. Further, the Governor's budget significantly cuts funding designated specifically for persons with severe and persistent mental illnesses. This includes a $730,000 cut to Mental Health Reform per the 1990 promise, a $577,000 cut from community mental health center base funding, removal of $200,000 from vocational programs (which would generate over $750,000 in federal funds), a lack of any increase to consumer-run programs and the frightening possibility of major cuts in Medicaid. These cuts by themselves will

dramatically cut needed community-based services to the population with disabling mental illnesses.

Compound the cuts by adding sexually violent persons who will receive priority treatment because they would be court ordered, into an already underfunded mental health system, creates further victimization of a number of persons who, through no fault of their own, are very ill.

If passage of SB 525 is the will of this legislature, we ask that you:

1. Guarantee separate housing for the populations.
2. Support reinstatement of all mental health cuts as reflected in the Governor's budget.
3. Fully fund implementation of this act in addition to reinstatement of the cuts.

Thank you.

Approved: 3/22/94
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 10:00 a.m. on February 25, 1994 in Room 514-S of the Capitol.

All members were present.

Committee staff present: Mike Heim, Legislative Research Department
Gordon Self, Revisor of Statutes
Darlene Thomas, Committee Secretary

Conferees appearing before the committee:

Senator Tiahrt
Phil Journey
Diana L. Conner
Michael Ballard
Magistrate John Wooley, Wichita
Michael Daly
Gregory Gragg
Jim Clark, Kansas Counties and District Attorneys Association
Loren Younger, Kansas Sheriff's Association
Ron Olin, Kansas Chief's Association
Terry Maple, Kansas Highway Patrol
Paul Shelby, Assistant Judicial Administrator

Others attending: See attached list

SB 525 – sexually violent offense

Senator Vancrum gave a brief overview of *SB 525* to include the balloon *(Attachment No. 1)* and answered questions from the Committee.

A motion was made by Senator Vancrum, seconded by Senator Bond to amend SB 525 by adopting the balloon and by making conceptual technical amendments. The motion carried.

A motion was made by Senator Vancrum, seconded by Senator Harris to report SB 525 favorably as amended.

A substitute motion was made by Senator Petty, seconded by Senator Martin to report SB 525 favorably with an additional amendment to be subject to appropriations. Motion failed.

The Committee returned to the original motion by Senator Vancrum, seconded by Senator Harris to report SB 525 favorably as amended. The motion carried.

SB 666 – fraudulent representation on employment application

SB 667 – inmates sentenced to custody of secretary

Senator Vancrum reported there would be a substantial fiscal not for *SB 666*. He stated the Department of Corrections felt *SB 667* might result in under utilization of work release programs.

No action was taken on *SB 666* or *SB 667*.

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Michael O'Neal at 3:00 p.m. on March 21, 1994 in Room 313-S of the Capitol.

All members were present except:

Representative Tom Bradley – Excused
Representative Candy Ruff – Excused
Representative Elaine Wells – Excused

Committee staff present:

Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Others attending: See attached list

SB 525 – Civil commitment of persons who commit sexually violent offenses, *(see attachments 1-15)*

Chairman O'Neal explained that the sub-committee approved an amendment that would require a separate building to be segregated from the other mentally ill or developmentally disable population, *(see attachment 16)*.

Chairman O'Neal made a motion to adopt the sub-committee report. Representative Adkins seconded the motion. The motion carried.

Substitute SB 608 – Sentencing for persons who commit any felony for a criminal street gang, *(see attachments 17-20)*.

The Chairman explained that this bill would increase the penalty for street gangs. The sub-committee recommended adding language that the courts could take into consideration that the defendant committed a felony violation for the benefit of, at the direction of, or in association with, any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members. Also included is the definition of what a criminal street gang would be comprised of, *(see attachment 21)*.

Chairman O'Neal made a motion to adopt the sub-committee report. Representative Mays seconded the motion. The motion carried.

SB 607 – Increasing the penalties for stalking, *(see attachment 22)*.

The Chairman commented that the sub-committee reworked the definition of stalking to read that stalking is an intentional and malicious following or course of conduct directed at a specific person which seriously alarms, annoys or harasses the person, and which serves no legitimate purpose. Also the severity levels were changed and the definition of harassment was stricken because it included the term harass in the definition, *(see attachment 23)*.

Chairman O'Neal made a motion to adopt the sub-committee report. Representative Adkins seconded the motion. The motion carried.

SB 656 – Battery against a youth center employee, *(see attachment 24)*.

Chairman O'Neal explained that the sub-committee recommended that the bill be passed favorably. The Senate had added juvenile detention employees and the sub-committee felt that this was appropriate.

Chairman O'Neal made a motion to adopt the sub-committee report. Representative Adkins seconded the motion. The motion carried.

SB 670 – Crimes and punishment related to arson and aggravated arson, *(see attachment 25)*.

The Chairman commented that the sub-committee recommended that no action be taken on the bill.

Chairman O'Neal made a motion to adopt the sub-committee report. Representative Robinett seconded the motion. The motion carried.

State Of Kansas

[SEAL]

Topeka

Senate Chamber
State Capitol
Topeka, Kansas 66612-1504
(913) 296-7361

Bob Vancrum
Senator, Eleventh District
Overland Park, Leawood.
Stanley Stilwell, In
Johnson County
9004 W. 104th Street
Overland Park, Kansas 66212
(913) 341-2609

Committee Assignments
Vice-Chairman: Energy
And
Natural Resources
Member:
Ways And Means
Judiciary
Member:
Commerce, Labor
And
Regulations Committee,
National Conference On
State Legislatures
Member: Environmental
Task Force, Council On
State Governments

IN RESPONSE TO THE TESTIMONY FROM THE ASSOCIATION OF COMMUNITY MENTAL HEALTH CENTERS OF KANSAS:

1. SB 525 does *not* decriminalize sexual offenses, as the Association claims. It provides for civil commitment of sexually violent predators who, under the statute, *already* are serving criminal sentences for their acts.

The Association rightly says that civil commitment should be used only to commit individual [sic] determined to be dangerous to themselves or others because of their mental illness. The state of Washington,

for example, has sought to classify only 3% of its 1500 sex offenders as sexually violent predators. There seems little doubt that this narrow class of the most dangerous sexual offenders presents a danger to others once they have served their time. This being the case, civil commitment and treatment of these individuals is altogether appropriate.

2. The Association's safety concerns are legitimate and protection of those currently in state mental hospitals will be addressed, with the cooperation of SRS, if the bill becomes law.

3. The bill seeks to place no stigma on those with mental illness. Rather, its goal is the treatment of sexually violent predators and the protection of the community. Those found to be sexually violent predators are, by definition, individuals with mental abnormalities or personality disorders and as such, *need* treatment for mental illness. Indeed, evidence shows that the prognosis for rehabilitating sexually violent offenders in a prison setting is poor.

4. As the association recognized, the treatment of sexually violent offenders will cost money. But SB 525 is not an attempt to "syphon" resources from SRS, nor is it an attempt to use the mental health system as a "dumping ground", for sexually violent predators.

As the Washington state experience shows, this bill targets a very *small* group of only the most violent offenders. Washington has filed cases under its law in only 28 cases in more than 3 years.

5. Finally, the association claims the bill does not completely solve the problems of treatment and sentencing of

sexual offenders. Admittedly, SB 525 is no cure-all. It is but one step – but an important one nonetheless – in a larger effort. The state has neither the financial resources nor the facilities to impose criminal sentences of life imprisonment on sexual offenders, as the association suggests. Practical reasons aside, criminal life sentences present constitutional questions that no doubt would result in years of litigation and more tragedies for families like the Schmidts. The practical reality is that sex offenders eventually return to the community. This bill, which is civil and not criminal in nature, aims to protect the community from the most dangerous sexually violent predators.

[LOGO]

JOAN FINNEY, GOVERNOR OF THE
STATE OF KANSAS

KANSAS DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES

DONNA WHITEMAN, SECRETARY

March 1, 1994

The Honorable Robert Vancrum
Statehouse – Room 449-N
Topeka, KS 66612

Dear Senator Ranson:

Senate Bill 525 establishes civil commitment procedures for the long-term care and treatment for persons determined to be sexually violent predators.

Section 1 of SB 525 suggests legislative intent to very narrowly apply these procedures to only those sexually violent offenders deemed to be the most dangerous. This section also states the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the treatment act for mentally ill persons.

Given these assumptions, we should anticipate an initial need for a secure facility with the capacity of roughly one hospital ward (20-30 beds) if SB 525 were enacted. However, since the prognosis for cure is poor and treatment needs are very long term, future planning should accommodate the probability of increasing demand for secure beds. Although estimates are difficult to establish at this time, it is not unrealistic to anticipate the need for an additional secure ward every two to three years.

Finally, since the target group of SB 525 is extremely dangerous and the treatment modalities very different, the secure facility where sexually violent predators are committed needs to be carefully designed and managed. From a treatment perspective, the more self-contained or autonomous the residential sex-offender program setting, the greater the benefits to both staff and residents, and the more likely it is the program goals will be met. Sexually violent predators should not be co-mingled with the psychiatric patients in our State Hospitals. SRS also maintains the Department of Corrections is better able to manage a secure facility of this type with MHRS providing treatment services. The secure nature of this facility is

qualitatively different than the typical management structure and expertise of the State psychiatric hospitals.

Sincerely,

/s/ Donna L. Whiteman
Donna L. Whiteman
Secretary

DLW:GDV:RP:MH:bb

[LOGO]

JOAN FINNEY, GOVERNOR OF THE
STATE OF KANSAS

KANSAS DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES

DONNA WHITEMAN, SECRETARY

January 28, 1994

The Honorable Robert Vancrum
The State Senate
State Capitol Building, Room 449-N
Topeka, Kansas 66612

Dear Senator Vancrum:

Senate Bill 525 proposes to provide a system of civil commitment to a facility operated by SRS for persons completing a prison sentence for specified violent, sexual offenses. Determining annual costs for a new program is difficult without a full understanding of the specific goals of the proposed legislation.

We contacted the Department of Corrections and determined there were 331 individuals released during FY 1993 who met the criteria stated in Section 2 of this bill. We are not able to make an accurate estimate on how many of these individuals would be committed to SRS custody. The projected annual cost for each resident of the State Security Hospital for FY 1995 is $57,966. The first year costs could range from (assuming an average stay of 6 months for new admissions) $898,473 for 10% of the released population to $9,593,373 for 100%.

Currently, the State Security Hospital at Larned, Ks. has approximately 30 available beds. The first year of Mental Health Reform downsizing closed 30 adult beds, which allowed us to correct overcrowding on the Security Behavior Ward, but created no new available beds. The final two years of reform could make from 40 to 60 beds available, assuming appropriate remodeling. Should the expected bed need created by SB 525 exceed 70 to 90 beds a new facility would be required. The Attachment provides construction estimates for various sized secure facilities. These estimates were based upon the costs of construction of the Correctional Mental Health Facility in Larned, Ks.

Please do not hesitate to contact George D. Vega at 296-3773 if you need any additional information.

Sincerely,

/s/ Donna L. Whiteman
Donna L. Whiteman
Secretary

DLW:DAJ:hb

cc: Senators Bogina, Bond, Burke, Corbin, Emert, Feleciano, Frahm, Hardenburger, Harris, Kerr, Langworthy, Lawrence, Martin, Morris, Oleen, Papay, Parkinson, Ramirez, Ranson, Reynolds, Rock, Salisbury, Sallee, Steffes, Tiahrt and Vidricksen

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State Of Kansas

[LOGO]

Topeka

House Of
Representatives

James E. Lowther
Representative 60th District
Lyon County
1549 Berkeley Road
Emporia, Kansas 66801

Committee Assignments
Chairman: Legislative Post Audit Committee
Subcommittee Chairman: Appropriations
Member: Education Taxation

March 14, 1994

To: Members of House Judiciary Committee

From: James E. Lowther

Subject: SB 525 by Senator VanCrum and all other 26 Republicans Senators: "Civil commitment of persons who commit sexually violent offenses"

The Sex Predator bill passes the Senate 40 to 0 and the hearing is set for today (3/14) in the House Committee. After a visit with Dr. Mani Lee, Superintended at Larned

State Hospital, I became concerned that the bill might pass in its present form.

Dr. Lee pointed out some problems with the bill that he is very concerned about over staff training and materials and equipment. Currently, there is no Larned State Hospital staff with the expertise to be involved in treatment activities of sexually violent predators. New staff hired for this purpose need to be given special training in facilities outside of Kansas. Also, he states that new equipment and treatment materials need to be purchased. There is no provision in the bill for all this.

Dr. Lee, working with Dr. Stuart Fager, Chief Psychologist at Topeka State Hospital, estimates the minimum number of staff recommended is 41 FTE at an estimated cost of $1.4 million for a program of 25 beds. Having just worked on the budget for the hospital, there is no way these costs can be absorbed. (In fact, under the House Appropriations, the hospital is slated to close two wards and $555,000 was cut from the budget).

There is concern, also, over the fact that in order for the treatment of these offenders to be carried out successfully, the program *must* have control over whoever is admitted. Dr. Lee and Dr. Fager say that SB 525 does not allow for control over who is admitted. These were some of the main problems with the bill that were pointed out to me. I hope you will try to address them in committee.

[LOGO]

Speak out for Stephanie

3/14/94
Kansas House Judiciary Committee
RE: Senate Bill 525
The Stephanie Schmidt Sexual Predator Act

Mr. Chairman and members of the committee:

Good afternoon, I am Gene Schmidt, father of Stephanie Schmidt. Those are words that continue to bring pride to my heart and tears to my eyes. Not because of what she accomplished in her life, but because of what has been denied by her death.

Because of my daughter's death, I along with many others worked on a task force to develop proposed changes in our laws. Changes that would put brakes on the runaway crime of repeat sex offenders. We have proposed 5 very good bills. And, we have turned the process over to very capable and honorable elected officials.

I felt very comfortable with the process. I knew that it would take some time. I knew it would have some opposition. But, I knew my government would not let me down again. Not this time.

But then, I pick up the newspaper and read how some representatives feel we should really take it slow. We shouldn't move to [sic] fast. Others have commented that my wife and I are too emotional about this subject, that we are exploitive and reactionary. Others have gone as far as saying our task force was vigilante group.

Let me assure everyone of a few things: one, I am emotional about this subject, yet I have used every ounce of courage and self control to hold back my tears and my anger. Emotional, yes; illogical, no! As for being exploitive and reactionary, there is no personal advantage in this campaign. Nothing can change the past, we are only trying to save the future for others like Stephanie. How can the desire to do what is right for others be reactionary? Finally, we strongly propose vigilance, not vigilantism.

But then I turn on television and hear now a senator feels about all the proposed crime bills. Some have said these bills would get passed to please the people, but the bills would have no effect. Others say we need more education not incarceration. Yes, we need improved education for sure! But we must close this revolving door of justice before we can offer early preventive methods. Let us put out the fire before we start to rebuild the barn.

In addition to changes in our laws we must change attitudes. We have to change attitudes toward rape, toward criminals, and toward our broken justice system. We have to remove this criminal cancer from our society and we must do it swiftly, boldly, and with the sincere desire to save our society. Even with tougher laws in place, we feel that public safety and awareness have to be paramount to any sexual predators release.

Keep in mind, these are not accidental criminals. Pediphilies [sic] and rapist are not criminals of mistake. These people want to hurt women and children. For us to

continue to turn them loose on the unsuspecting communities and employers is an injustice to everything our country believes in.

The bills we have proposed are good bills. And, they have built in safety devices. The sexual predator acts will keep the repeat sex offenders in – maybe! The rest of the elements: registration, public and employer notification are the safety nets. Some of these predators will slip through, because we keep turning our most violent criminals loose on the public. The same criminals who hide behind our justice system and abuse the judicial process.

My daughter received the death penalty by one of these "released" criminals. She had done no wrong; she had not violated any law; she just accepted a ride home with a friend – a friend who by the choice of my government was protected by right of privacy and from revealing he was a rapist. He did not have to register; his employer did not have to know about his past; and he did not worry about lying on his application. Worst of all, he should never have been released.

I have been told that the wheels of justice move slowly, but I never understood why. It's because citizens like myself have to drag these same wheels with governmental brakes in place. How much longer are we going to wait? How many more rapists and pediphiles [sic] are going to be released before you act on this bill? How many more innocent lives will be shattered while we debate?

Our task force met numerous times and researched the proposal with great detail. Our proposal was not only based on a tried and tested law from another state, but

also on the availability of space in institutions like Larnard, [sic] Kansas: a mental institution that was about to close down a wing for the criminally insane. We do have space: space that would not require additional funding, nor would it require co-mingling of patients with other mental disorders.

In preparing this bill, we constantly measured its effectiveness by one burning question: Who could possibly oppose this bill? In the end, we found our answer: No right thinking person could oppose this bill. We can not continue to experiment on the public. Now is the time for Kansas to show the world its true leadership abilities. Pass Senate Bill 525.

House Judiciary Subcommittee
March 14, 1994
Re: SB 525

Chairman O'Neal and other Committee Members:

On behalf of the Kansas Coalition Against Sexual and Domestic Violence (KCSDV), and Safehouse, which provides services to sexual assault victims in Southeast Kansas, I want to thank you for considering this bill. Both KCSDV and Safehouse urge you to give Kansans necessary protection from sexual predators. I would like to remind you of several things I hope you consider:

1) When considering the cost of enactment, the cost of taking no action must also be reviewed. The cost of these preventable crimes to the victim and family members is great, often resulting in irreparable damage, long-term psychiatric hospitalizations, or loss of life. Additionally, this type of trauma can be devastating to whole communities. The shock waves from the news of Stephanie Schmidt's trauma and death were devastating to many Southeast Kansans. Suddenly, many rape victims who had done fine for many years were back in crisis; flashbacks, nightmares, and other symptoms emerged, causing them to miss work and become dysfunctional in many ways. Our hotline was "hotter" than it has ever been with this type of call. Furthermore, even those who had never been victimized were traumatized. Suddenly, no one felt safe. I repeatedly was called by members of the community who would say they could hardly work without bursting into tears, fearing for their own daughter's safety, terrified that it would happen to a loved one of theirs. The loss of productivity, damage and cost of

repair to the victim and family members, and to the whole community must be considered.

2) This bill is essentially not new. A similar bill was introduced by Senator Dave Kerr and worked by the Senate Judiciary Committee a few years ago, under the direction of Wint Winter. I can't help but think that all of us might very well have been spared the senseless Stephanie Schmidt tragedy, had that bill been passed.

3) This bill is very similar to a Washington State law, which has withstood judicial challenges to its constitutionality.

As you work this bill, we urge you consider its benefits to potential victims, family members, and communities. We believe there is an ethical consideration to protect society from this type of known predator. Thank you for your consideration of our concerns.

Dorothy Miller, Executive Director,
Safehouse, Inc.

KANSAS ALLIANCE FOR THE MENTALLY ILL
S.W. 6th Ste. 305 • P.O. Box 675
Topeka, Kansas 66601
913-233-0755

Testimony on SB525
March 14, 1994

My name is Howard Snyder, and I live in Prairie Village. I am speaking today on behalf of the Kansas Alliance for the Mentally Ill, a state wide organization of families and friends of Kansans who suffer from mental illness.

It should be stated up front we strongly support the "why" behind HB [sic] 525. It addresses a problem that must be solved. But we are in opposition, yes even in shock, at the "how". On page 4, line 27, it states that these very dangerous people are to be turned over to the custody of the secretary of SRS to be held in a secure facility. There is no definition of a "secure facility", so it is conceivable that a secure facility could be any one of the state psychiatric hospitals. This means that these people could be mixed in with our very vulnerable mentally ill family members. This is like putting the fox in the hen house.

I have a 34 year old son who suffers from Schizophrenia, which is a no-fault noncureable brain disease. From time to time, for the rest of his life he may require hospitalization as his symptoms recur. As a poor person with a pre-existing lifetime disease, he is uninsurable in the private system, therefore, he will only have access to the state hospitals. I do not want (nor do you) my son raped by a dangerous sexual predator who has been placed in a state hospital because of SB525.

We already have in front of us the tragedy of the young staff member at Topeka State who was murdered by a dangerous person who had been placed in the general hospital population after the closing of the Awle unit two years ago. We in Kansas AMI stated publically [sic] it was not right to expose the ill people in Topeka State to those dangerous persons. We were told that everything would be alright, and now we all have to live with the consequences. Have you forgotten so soon? The bill should be revised to require that sex offenders be held in a facility away from all state hospitals, preferably by the Department of Corrections which has the facilities and the expertise for holding long term high security inmates.

Another major concern of the families and friends of those Kansans who suffer from mental illness is financial. What is the cost? Where is the fiscal note? We understand that the cost has been estimated at $8 million for the first year, but we have seen nothing in writing.

We understand that the experience in other states has been that only a few sex offenders respond to treatment (the treatment technology in this area is primitive), and that those only responded after very long term very expensive treatment. Page 7, line 3 states that the secretary of SRS is responsible for *all* cost of evaluation and treatment of offenders in custody. Where does the money come from for this new responsibility?

Unless new funds are made available, the new responsibility can only be paid for from existing SRS or DOC funds. If paid from the SRS budget, then it will be paid for by a few – those whose SRS services are cut. If the general population is pushing SB525 then that's who

should pay for it. Any dilution of services to the mentally ill to pay for sex offenders is the equivalent of a selective tax on disabled Kansans who are already poor. What has my disabled son done to be saddled with the cost of providing care to a sexual predator?

In conclusion, consider this. The way SB525 is written, my son is put at risk of being the victim of a sexual predator while he is hospitalized, and having to pay for the predator to be there to prey on him.

Affiliated with the National Alliance for the Mentally Ill.

/s/ Howard W. Snyder
Howard W. Snyder

(LOGO)™ **THE PUBLIC POLICY COUNCIL**
of The Mental Health Associations in Kansas

1333 South 27th Street, Kansas City, Kansas 66106-2124
(913) 722-1115 *FAX (913) 362-8250*

TO: Members of the KS House Judiciary Subcommittee #1

FROM: Betty K. Meyers, Legislative Liaision [sic] Public Policy Council, Mental Health Associations in Kansas

RE: Senate Bill 525 – Sex Predators

DATE: March 14, 1994

I am here today to register the opposition of the Public Policy Council of the Mental Health Associations in Kansas to Senate Bill 525.

We believe that over the long term the placement of sex predators in the custody of SRS will mean a shift in resources away from the treatment of the mentally ill to a group for whom successful treatment strategies do not currently exist. A shift in state dollars to a population for whom treatment does not currently exist away from a population for whom treatment has been shown to be effective makes no sense to our organization.

We also believe that this bill will only serve to endanger the lives of the persistently and severely mentally ill population and place this very vulnerable at further high risk for being taken advantage of as well as physical and psychological abuse.

Until such time as effective treatment strategies become known and are shown to have positive outcomes, we believe that sexual predators should be in the custody of the Department of Corrections. To do otherwise will ultimately mean that this population will most likely end up in mental health centers where there is no capability to handle them, or state hospitals where, until the introduction of this piece of legislation, there has been an effort to close wards and reduce beds (passing these savings along to the local level for the development of services for the mentally ill). We ask you to report this bill adversely.

TESTIMONY ON SB 525

I congratulate the legislature for attempting to rid the community of repeat sexual predators via the so-called "Stephanie Schmidt Bill". We would rather have these repeat offenders in the criminal justice system, because that is what they are – criminals.

However, if they must be placed in the mental health system, we have two requests.

1. After the phrase "held in a secure facility", add "in a building separate from the rest of the Mentally Ill or Developmentally Disabled population". Once before the SRS Administration had the responsibility of keeping violent inmates in a "secure facility"; in this case a locked ward in the Topeka State Hospital. They failed this responsibility and the tragic death of employee, Stephanie Uhlrig followed. Senator Vancrum wants to place these predators in a to-be vacated ward of the old Dillon building at Larned, a building designed to house the criminally insane. We concur. SRS is interested, but has yet to formally agree.

The Senator insists the [sic] the "intent" of this bill is not to jeopardize the present Mental Health population or staff, but the road to you know where is filled with good intentions. Please place this guarantee in the bill!

2. Incarceration of these dangerous predators will cost an undetermined amount of money. To carve this expense out of the present Mental Health budget hurts people who cannot fight back, the Mentally Ill, and could nullify at least part of Mental Health Reform. Please place

enough "new" money in the budget to care for this new class of inmates.

I beg you to think thru the ramifications of this bill before it becomes law. Thank you for your consideration.

Sincerely,

/s/ Hugh T. Moore
Hugh T. Moore, DDS
Advocacy Chairman,
Mental Health Assn.
of Johnson County

TESTIMONY ON S.B. 525

PRESENTED TO:

1994 HOUSE JUDICIARY COMMITTEE

PRESENTED BY:

GEORGE D. VEGA, COMMISSIONER
SRS MENTAL HEALTH & RETARDATION SERVICES

ON BEHALF OF:

DONNA L. WHITEMAN, SECRETARY
SOCIAL AND REHABILITATION SERVICES

SRS Mission Statement

"The Kansas Department of Social and Rehabilitation Services empowers individuals and families to achieve and sustain independence and to participate in the rights, responsibilities and benefits of full citizenship by creating conditions and opportunities for change, by advocating for human dignity and worth, and by providing care, safety and support in collaboration with others."

Testimony on S.B. 525
Presented to the Senate Judiciary Committee
March 14, 1994

The Department of Social and Rehabilitation Services (SRS) opposes S.B. 525 in its present form. We strongly agree with the need to protect society from dangerous sexual predators.

SB 525 represents one step toward addressing a major society problem. The mental health system wants to do its part. We want to state up front mental health treatment may assist a very small number of sexual predators if sufficient resources are provided, but the numbers are extremely small in comparison to the number of people labeled a sexual predator or convicted of a sex-related crime. The mental health system also will resist doing anything which threatens services to the most vulnerable Kansas citizens we are currently serving.

Mental health treatment will not fix the problem. We strongly agree with the opening statements in the bill which advise sexual predators are extremely dangerous and:

- Do not have a mental disease or defect which would allow them to be treated by the current mental health system.
- Generally have antisocial personality features which are:
  - not treatable with today's mental health technology, and
  - make them likely to engage in sexually violent behavior.
- Are likely to repeat acts of violence.

- The treatment needs of this population are very long term.

Mental health professionals have told us:

- Keep this population separate from people with serious mental illness; either in general psychiatric hospital settings or in the state security hospital.
- Focus only on those who *volunteer* to participate; people who want to participate represent those most likely to respond to treatment.
- Control admissions through rigorous screening; keep the numbers within capacity for reasons related to treatment and security.
- If the process requires professionals to state a sexual predator is cured or not likely to repeat acts of violence before a person is discharged, the professionals will not make such statements which might place their reputations and licenses on the line. This means the patients may never be released.
- Successful treatment programs require long-term treatment, usually at least three to five years. The Washington program is four years old, too early to measure its success or failure.

Safety of Those With Mental Illness

The bill requires commitment to a secure facility but does not define or identify the facility. Even though State Security Hospital patients are prisoners or defendants, they are generally seriously mentally ill and thus are

vulnerable. These individuals, therefore, would be subject to exploitation and harm from the predators.

Hospital Vs. Security

The Larned State Hospital has, for some time, been faced with accreditation difficulties with the Joint Commission on Accreditation of Hospital Organization (JCAHO) because of the Security Hospital. Essentially, JCAHO has indicated the Security Hospital appears to be more of a prison than a hospital. Security is more of a priority than the therapeutic environment. As a result of this finding, the hospital has had to take steps to enhance the environment by such things as gradually unlocking bedroom doors at night.

This accreditation difficulty only would be heightened if the sexual predator program is housed in the Security Hospital because there is a substantial need for security with such a program.

It is noted the statute governing the sexual predator program in the state of Washington specifically states: "The facility shall not be located on the grounds of any state mental facility or regional habilitation center because these institutions are insufficiently secure for this population." Housing of the program at the Security Hospital becomes a paradox. If security needs are met, accreditation is threatened. If the therapeutic environment is addressed, security is threatened. It also is noted that the ward housing the sexual predator program cannot be excluded from the JCAHO process. There is no **distinct part** provision like there is with HCFA certification.

Space, Education, Training

According to research conducted by the chief psychologist at one of the state hospitals, one of the required characteristics of a successful program is adequate funding for staff, materials, staff training as well as having adequate space to implement the program. Currently, program space at the Security Hospital is less than adequate even for existing programs. Further, there are no staff at Larned State Hospital with the expertise to be involved with treatment activities of sexually violent predators. Larned experiences severe difficulty in recruiting appropriately-trained employees such as psychiatrists, psychologists, and other professionals. Training, educational materials, and equipment is estimated to be in excess of $60,000.

Protection of Society

Clearly, the intent of this bill is to protect society from violent sexual predators. However, as I also understand, the intent is to limit the number of persons involved in the program to approximately the same number as those involved in the program in the state of Washington (20-30). If the number is limited, then protection of society is not achieved except for the limited number who are involved in the program. We note 331 individuals who meet the criteria of the bill were released in FY 1993 from the Department of Corrections.

Although Section 1 of the bill suggests legislative intent to very narrowly apply civil commitment procedures, there is no mechanism to limit the number or kind of individual who can be committed. As a result, there are

likely to be a significant number of individuals who are committed who are not amenable to treatment and for whom treatment is not appropriate. Warehousing these individuals would be the result, and the treatment program would be ineffective.

Furthermore, if the commitment procedures are applied more liberally than the intent to narrowly apply them, the fiscal note will be substantial. As I mentioned earlier, there were 331 individuals released from the Department of Corrections in FY 1993 who met the criteria for commitment under the provisions of this bill. If 90 percent of the individuals were committed, the estimated cost for the first year would be approximately $8.6 million. Since treatment is long term with little guarantee of success, discharges would be few, and the cost would escalate as the number of commitments increase.

Participation in the Washington sexual predator program is voluntary. Implied in the voluntary criterion is the notion of cooperation on the part of the participant, and it can be assumed uncooperative individuals are excluded, and these individuals are likely to be more antisocial and more dangerous. Thus, it cannot be guaranteed that committing the more cooperative individuals will protect society from the most dangerous of sexual predators.

Targeted Populations

Assuming responsibility for a new population increases the possibility of diverting resources from the established targeted populations of adults with severe and persistent mental illness and children/adolescents with serious

emotional disturbances. We are concerned the needs of these most vulnerable of individuals will not be met.

Civil Commitment

Civil commitment is not intended for individuals who choose, of their own will, to commit violent sexual crimes. Civil commitment is intended for those who are unable, because of a thought disorder, to make reasoned decisions about the reality and effects of their illness.

Aftercare

Another essential characteristic of a successful, comprehensive treatment program for sexual predators is the adequate provision of aftercare. Presently, there is a paucity of community programs for this population.

Recommendations

Like you, we want the safety of society protected, and we want to work with you to accomplish this goal. In this light, I urge you to consider a joint effort between the Department of Corrections and SRS to address this problem. This approach seems consistent with the initiative in the state of Washington. We would suggest language be added to the bill in Section 7 (a) to have the facility operated by the Department of Corrections with custody of the individual remaining with the Secretary of SRS. The Secretary of SRS would then contract with the Department of Corrections for the facility, perimeter security, meals, laundry and barber services, and medical

and dental services. The Secretary could retain responsibility for the treatment program.

I also would recommend a section be added to allow for screening of individuals by a mental health professional when there is an intent to file a petition for commitment. Such a provision would allow the intent to narrowly apply commitment procedures to be maintained. Such screening could be conducted by program staff.

If the program is housed in the State Security Hospital or the Department of Corrections, we would recommend a separate funding stream and budget specifically for this program.

Fiscal Note

One ward at State Security Hospital – estimated $434,745 first year assuming five commitments per year and ten evaluations . . . annual cost to increase to $2,183,951 by FY 2000. However, a full staff would be necessary for the program even if only five individuals were admitted. Thus a beginning figure is estimated to be $1,400,000.

Training, education, equipment – $65,000

With no mechanism to limit those committed using FY 1993 individuals who meet criteria of bill released from Department of Corrections – $8,607,899.

Program housed in Department of Corrections (using State of Washington data for FY 1994) – $2,688,904.

(LOGO) KANSAS MENTAL ILLNESS
AWARENESS COUNCIL INC.

House Judiciary Subcommittee #1

March 14, 1994

Executive Director
Associate Director
P.O. Box 12546
Kansas City, Kansas 66112
Office: (913) 432-4544
(913) 432-8682

Good Afternoon Members of the House;

I would like to thank you for this opportunity to speak with you today.

This is a very serious issue for those of us with mental illness, let alone those not mentally ill and even for families and friends it is like a nightmare. That someone who may have abused one of us, may be put in the same hospital or Community Mental Health Center as us. Some of the memories it would bring back, would be a living *hell*, setting us back to square one and to work through all those issues again.

We realize these people need help too but *why* can't the Dept. of Correction's put into place, their own mental health centers and hospital buildings, away from us who have a hard time just dealing with *our own illnesses*. If not, this would cause great havoc for us and for what it will cost in additional medicine and hospitalization time.

With a well organized program you could put things in proper order, to take care of the abusers and those like them, separately from us. As a rule, those of us with a mental illness do not want to hurt anyone or have anyone hurt us. Sometimes it is awful difficult just to take care of

ourselves, let alone to have to worry about who is next to us.

We realize everyone has rights, but taking away a secure, safe hospital is not the way to do this either.

We believe, the Dept. of Corrections System could set in place a special, secure but separate, care facility for these sexually violent predators.

We believe, that you need specially trained professionals and staff to care for these abusers, which is not the same kind of training as for mental illness. We are different but we are dealing with this. We, the mentally ill, can't deal with the past abusers, even as well as the average person, because so many of us have been abused by just such people as these and are hypersensitive and fearful about this issue. Even as a previously wounded animal is "gun shy" we are "abuse shy" particularly of sexual perpetrators. If you mix these sexually violent predators with the *mentally ill*, you will add greatly to our burden. We are not against the intent of this bill but against how it attempts to do it, with no guarantees. We fear without other guarantees in place that, there should be some way, the Dept. of Corrections could set things in place for control, care and treatment of these people and by putting such persons in a secure separate facility.

Due to the above reasons, KMIAC strongly opposes this bill. No one in the mental health system as professionals, needs this with the rest they have to deal with. We voice opposition to this unless;

1. Full funding is guaranteed.

2. No dollars intended to benefit the general psychiatric population (in the hospital or in the community) are diverted now or in the future.

3. All mental health cuts in the Governors budget are fully reinstated.

4. Separate facilities are guaranteed.

Thank you for listening,

/s/ Esther M. Fitzgerald
Esther Fitzgerald
President – KMIAC

(LOGO) KANSAS MENTAL ILLNESS
AWARENESS COUNCIL INC.

House Judiciary Subcommittee #1

March 14, 1994 Executive Director
Associate Director
P.O. Box 12546
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Good Afternoon Members of the House;

I thank you for the opportunity to speak to you today. I am Lonny Lindquist, Executive Director of the Kansas Mental Illness Awareness Council (K.M.I.A.C.), which is the recognized state consumer organization of Kansas. I am also the coordinator of the Ottawa, Ks.

based #1 local consumer run organization, Support Program for Independent Responsible Individuals in Transition Inc. (SPIRIT). I have been a consumer of mental health services since 1970 and in Kansas since 1985.

About this bill, #SB525, which authorizes civil commitment to our state hospitals for convicted sex abusers after serving their prison terms. I don't think anyone can be against keeping them off our streets, possibly getting them some help in a better, yet controlled, environment.

I do think it is unrealistic to consider this bill without *first* including, at least, the following guarantees;

1. Guarantee that this said population gets separate housing facilities with specialized care. (*Guaranteed* not to be mixed with the present population of those mentally *ill*)

2. Guarantee that you provide full funding, separate and apart from those present mentally ill funds, so as not to drain off those limited mental health system moneys or be diverted to sexually violent predators. Thus operating with less, as the mental health system is forced to take on a greater number of population, especially since they would be mandated to do so and the court ordered, it is assumed, will take budget priority over other populations.

3. Guarantee all mental health cuts in the Governors' budget are fully reinstated.

I and those I represent are not against the intent of this bill, *but how it attempts to do it*, and *at who's expense* with no guarantees.

Thank you for your time and consideration in hearing what I have to say, I hope this will help in your decision making.

Sincerely yours,

/s/ Lonny Lindquist
Lonny Lindquist
Executive Director

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY, Room 313-S Statehouse, at 3:30 p.m. on March 21, 1994.

SB 661 – Revocation of driving privileges for persons convicted of crimes and person adjudicated as juvenile offenders.

Chairman O'Neal explained that this would allow courts discretion in juvenile cases to have as an additional penalty the revocation of driving privileges. The sub-committee recommended the bill be passed.

Chairman O'Neal made a motion to adopt the sub-committee report. Representative Carmody seconded the motion. The motion carried.

SB 525 – Civil commitment of persons who commit sexually violent offenses

The Chairman explained that this was essentially the Washington State concept. What was missing in the proposed bill was the assurance that those that are civilly committed after a period of incarceration would be kept separate from the other mentally ill population.

Representative Adkins made a motion to report **SB 525** *favorably for passage as amended. Representative Robinett seconded the motion.*

Representative Garner commented that section 5 does not track with the Washington language and *made a substitute motion to strike "based on the petition" on page 4, line 4. Representative Robinette seconded the motion.* This would allow the judge to consider all evidence before him rather

than the evidence before him in the petition. *The motion carried.*

Representative Garner stated the bill includes the right to a 6 person jury trial for the determination of if the person is a sexual predator. *He made a motion to have the reference to the right to trial by a jury on page 4, line 32-33 be changed to the right to a jury trial provision under Chapter 22 in the criminal code where the make-up of the jury is 12 unless there is a stipulation from both for a jury less than 12. Representative Carmody seconded the motion. The motion carried.*

Representative Garner made a motion to insert language in section 7 that the court order would be an appealable order. Representative Macy seconded the motion. The Chairman stated that this is probably an appealable order but making this clear wouldn't present a problem. *The motion carried.*

Representative Wagnon questioned if this would require a totally separate facility or would they be placed in one of the mental hospitals. Chairman O'Neal commented that this bill proposes a separate facility but in the end it may not necessarily be a separate facility but a restricted wing. It is estimated that there would be 25-30 individuals in the first year. There is currently space in Larned, but it wouldn't be a separate building. There has been no separate building identified at this time. This is a way of dealing with those who are in the system now that DOC are afraid that they will be released on the streets, because they would commit another sexually [sic] act if they were released. By having a pre-release hearing to determine if the person ought to be civilly committed, the procedure is civil commitment.

Representative Garner questioned if this would apply to those who are already in the system. Chairman O'Neal replied that it could apply to anyone who is released after the effective date of the bill. Representative Carmody stated that a "reachback" would not be able to recapture those that have already been released on post-release supervision.

Representative Adkins made a motion to report **SB 525** *favorably for passage as amended. Representative Robinett seconded the motion. The motion carried.*

SB 629 – Increase in court docket fees for deposit in law enforcement training center fund

Representative Pauls made a motion to report **SB 629** *favorably for passage as amended. Representative Macy seconded the motion.* Representative Heinemann commented that he would like to see .50 cents rounded up to dollar amounts. Representative Goodwin commented that it would cause other programs to compete for the additional .50 cent docket fee. *The motion carried.*

SB 743 – Allowing county or district attorney to collect administrative handling cost from maker or drawer of bad checks

Representative Mays made a motion to report **SB 743** *favorably for passage as amended. Representative Pauls seconded the motion.*

Supreme Court, U.S.
FILED
AUG 1 1996
CLERK

No. 95-1649

In The

Supreme Court of the United States

October Term, 1995

STATE OF KANSAS,

Petitioner,

v.

LEROY HENDRICKS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Kansas

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QUESTIONS PRESENTED

1. Does the Kansas Sexually Violent Predator Act, Kan. Stat. Ann. § 59-29a01 *et seq.* – which provides for the civil commitment and long-term care and treatment of sex offenders who are found beyond a reasonable doubt both (1) to be suffering from a mental abnormality or personality disorder and (2) to present a continuing danger to society through a likelihood of committing future sexually violent offenses – violate substantive due process principles?

2. What level of constitutional scrutiny applies to a claim that civil commitment of a sexually violent predator for care and treatment deprives him of a liberty interest in violation of substantive due process principles?

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OPINIONS BELOW

The March 1, 1996, decision of the Kansas Supreme Court, holding that the Kansas Sexually Violent Predator Act violates substantive due process principles, is reported, 259 Kan. 246, 912 P.2d 129 (1996), and is included in the appendix to the State's petition for a writ of certiorari ("Pet. App."). *See* Pet. App. 1a-59a. Several rulings of the state district court in this proceeding also have been reprinted in the Joint Appendix ("J.A.").

STATEMENT OF JURISDICTION

This Court's jurisdiction to review the final judgment of the Kansas Supreme Court is invoked pursuant to 28 U.S.C. § 1257(a). The Kansas Supreme Court issued its decision in this case on March 1, 1996. Pet. App. 1a. The petition for a writ of certiorari was filed on April 12, 1996, and this Court granted the petition on June 17, 1996.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides that

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

The Kansas Sexually Violent Predator Act, Kan. Stat. Ann. § 59-29a01 *et seq.*, is set forth in full at Pet. App. 61a-72a. As noted there, there have been some amendments subsequent to the proceedings in this case, but they are minor and not material to the constitutional issues presented here.

STATEMENT OF THE CASE

Procedural History

Petitioner, the State of Kansas, initiated this action against Respondent, Leroy Hendricks, on August 17, 1994. J.A. 4. The State sought to have Hendricks, a convicted child molester, civilly committed to a state mental institution for long-term care and treatment under the Kansas Sexually Violent Predator Act, Kan. Stat. Ann. 59-29a01 *et seq*. The trial court rejected Respondent's constitutional challenges to the Kansas statute, J.A. 120-24, and, following a trial, the jury returned a verdict finding, beyond a reasonable doubt, that Hendricks is a sexually violent predator. *Id.* at 357, 360. The trial court ordered Hendricks committed to Larned State Hospital for care and treatment. *Id.* at 361.

On March 1, 1996, the Kansas Supreme Court reversed, concluding that the Kansas statute violates substantive due process principles. Pet. App. 1a-59a. The State requested that the Kansas Supreme Court stay its mandate pending the State's efforts to secure review of that court's decision in this Court. On March 22, 1996, the Kansas Supreme Court directed that its mandate be stayed for 30 days to permit the State to seek certiorari review in this Court. Pet. App. 60a. On April 22, 1996, this Court stayed the Kansas Supreme Court's decision pending the outcome of the proceedings in this Court. On June 17, 1996, this Court granted review of the State's petition in No. 95-1649, and Hendricks' conditional cross-petition in No. 95-9075, and consolidated the cases for oral argument.

Statement of Facts

1. The Kansas Sexually Violent Predator Act

The Kansas Sexually Violent Predator Act ("the Act"), Kan. Stat. Ann. § 59-29a01 *et seq.*, Pet. App. 61a-72a, was enacted in 1994 to address the problem of recidivist sexual offenders.[1] The Act grew out of the efforts of an Ad Hoc Sexual Offender Task Force and followed the highly publicized, brutal rape and murder of Stephanie Schmidt, a Kansas college student, by a convicted rapist recently released from prison. *See* Pet. App. 25a. The sponsor of the Kansas bill (S.B. 525), Senator Vancrum, declared that the Act was designed "to protect our communities from those offenders who pose the greatest danger to society by providing for treatment and commitment of sexually violent predators until they are no longer a danger." J.A. 460. He further stated that "[t]he bill is narrowly tailored to focus on the smaller number of habitual sex offenders who, because of their psychological makeup, pose an immediate danger to the public as soon as they are released from prison." *Id.* at 461; *see also id.* at 545-47. Several law enforcement officials also testified to the high recidivist rates for sex offenders. *See id.* at 475, 490, 492-96.[2]

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[1] As the Kansas Supreme Court observed, the Act is modeled on sexually violent predator provisions included in the Community Protection Act that the State of Washington enacted in 1990. *See* Pet. App. 4a.

[2] Some mental health groups or associations opposed the bill, although primarily on two grounds unrelated to the constitutional issue: (1) that there would be practical problems such as keeping the general population of mentally ill patients in state institutions safe from sexual predators and financing a sexual predator treatment program and (2) that by including sexual predators in the class of "mentally ill" persons subject to

The Act begins with a preamble which recognizes that sexually violent predators suffer from mental problems that require different treatment – both in terms of the type and length of treatment required – than many people committed under general involuntary civil commitment statutes. The preamble also recognizes that sexually violent predators create special risks to society. The preamble reads as follows:

> The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [general Kansas involuntary civil commitment statute], which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under [the general Kansas involuntary civil commitment statute], sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure . . . is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of

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involuntary commitment, the statute improperly stigmatized other mentally ill persons. *See, e.g.*, J.A. 463-64, 504-06, 512-15, 531-32, 536, 538-39, 562-64, 567-68, 572, 574-75.

> this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the [general Kansas involuntary civil commitment statute] . . . , therefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature.

Kan. Stat. Ann. § 59-29a01. The Act then defines several key terms which address the constitutional substantive due process requirements of *dangerousness* and *mental illness*. Among these are "sexually violent predator," which "means any person who has been *convicted of or charged with* a sexually violent offense and who suffers from a *mental abnormality* or personality disorder which makes the person *likely to engage* in the predatory acts of sexual violence." § 59-29a02(a) (emphasis added).[3] The Act defines "mental abnormality" as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." § 59-29a02(b). "Sexually violent offense" is defined to include any of a list of several Kansas sex crimes, such as rape, indecent liberties with a child, sodomy, indecent solicitation of a child, sexual exploitation of a child, sexual battery, aggravated versions of the foregoing offenses, or conspiracy or attempt to commit such offenses. § 59-29a02(e).

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[3] " 'Predatory' means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization." Kan. Stat. Ann. § 59-29a02(c).

The version of the Act in effect at the time of Hendricks' proceeding provided that 60 days before the anticipated release of a "sexually violent predator," the agency with authority over the release must notify the prosecutor in the county where the person was charged. § 59-29a03. (The current version requires that the Attorney General be notified). The prosecutor then has 45 days to file a petition invoking the Act's procedures. § 59-29a04. (Under the current version, all sex predator proceedings are handled by the Attorney General's office rather than by the county attorneys and the time periods are somewhat different). The next step is for the district court to determine whether there is probable cause to believe that the person is a sexually violent predator and, if so, to order the person transferred to an appropriate facility for an evaluation. § 59-29a05.

Promptly after the filing of the petition, the district court must conduct a trial to determine whether the person is a sexually violent predator. § 59-29a06. In the trial, the person is entitled to the assistance of counsel and the provision of a mental health professional to evaluate the person at public expense if necessary. *Id*. If the person makes a jury demand, then the trial is before a jury. *Id*. The trier of fact must determine whether the person is a sexually violent predator beyond a reasonable doubt. § 59-29a07. If that determination is made, then the person is committed to the custody of the secretary of social and rehabilitation services for "control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." § 59-29a07(a).

The Act further provides that the mental condition of a person committed under the Act must be reevaluated on an annual basis, including district court review and a determination whether there is probable cause to believe

that it is safe to release the person. § 59-29a08. If the court concludes that there is probable cause to believe that the person may safely be released, then the burden of proof is on the State to demonstrate beyond a reasonable doubt that the person's mental abnormality or personality disorder remains such that it is not safe to release the person. *Id*. The person also may file a petition seeking release at any time, § 59-29a11, or those having custody of the person may determine that the person's condition has so changed that release is appropriate and authorize the person to petition the court for release. § 59-29a10. The procedures and burden of proof in such a proceeding are the same as for a hearing on annual review. *Id*.

2. The Trial Court Proceedings

The State initiated this civil commitment proceeding against Leroy Hendricks on August 17, 1994, by filing a petition in state district court seeking the commitment of Hendricks as a sexually violent predator under the Act. J.A. 4-8. The State filed the petition against Hendricks in anticipation of his imminent release from prison after he had served almost ten years of a five-to-twenty-year sentence on child molestation charges. *Id*. at 5.[4] On August 19, 1994, Hendricks appeared before the district court with counsel and moved to dismiss the petition. *Id*. at 32-35. At the August 19 hearing, Dan Crask, a licensed specialist clinical social worker, testified that, in his opinion and based on a review of Hendricks' records, Hendricks met the diagnostic criteria for pedophilia,[5] J.A.

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[4] In 1984, Hendricks pled guilty to two counts of indecent liberties with a child, while a third count was dismissed as part of the plea agreement. J.A. 5.

[5] The American Psychiatric Association publishes a compendium of mental disorders entitled the *Diagnostic and*

24, and that pedophilia is a condition that "through research, we know has a certain amount of recidivism to it." *Id.* at 26. The district court reserved ruling on the constitutionality of the Act, concluded that there was probable cause to believe Hendricks was a sexually violent predator, and ordered that Hendricks be evaluated at the Larned State Security Hospital. *Id.* at 32-36. Hendricks did not cooperate. After another hearing on September 13, 1994, the district court conditionally ruled that proceedings under the Act are civil, not criminal. *Id.* at 36-43. The court then held a hearing on September 16, 1994, to determine whether Hendricks should be compelled to participate in a mental evaluation and, on September 23, the district court issued a final ruling that the proceeding was civil, not criminal, and that Hendricks therefore must comply with the Court's previous evaluation orders, *id.* at 120-24, which he eventually did.

Pursuant to the Act, the district court conducted a jury trial on October 3-5, 1994, to determine whether Hendricks was a sexually violent predator subject to civil commitment. J.A. 125-361. Hendricks was the first witness. He testified that he was sixty years old, *id.* at 125, and that his history of sexual involvement with children began in 1955 – he was 20 – when he exposed his genitals

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Statistical Manual of Mental Disorders. This work represents an effort to incorporate studies and other materials regarding the existence, components and diagnosis of mental disorders. The current version, which is the fourth edition and dated 1994, is commonly referred to as DSM-IV. DSM-IV sets out the criteria for a diagnosis of pedophilia, which is a recognized mental disorder. *See* DSM-IV 527-28. Hendricks' diagnosis will be discussed in more detail in the portion of the State's brief which addresses the substantive due process "mental illness" requirement, subpart B.3.a. below.

to two young girls. *Id.* at 131. One of those victims testified in Hendricks' sexual predator proceeding, describing in some detail how Hendricks had exposed himself to the girls while seated in his car and how he had invited them to get in the car and play with his penis. *Id.* at 191-93. In 1957, Hendricks was convicted of lewdness for playing strip poker with a 14-year-old girl, *id.* at 133, and in 1960, while working for a carnival, he molested two young boys – ages 7 and 8 – by fondling their genitals. *Id.* at 135-36.

After three years of imprisonment, Hendricks was paroled and then promptly arrested, convicted and imprisoned for molesting a seven-year-old girl by placing his fingers in her vagina. *Id.* at 139-41. He testified that he had befriended the girl's family so that they would permit him to take her on trips alone, during which he would molest her. *Id.* at 140. Hendricks testified that he understood his behavior was wrong, but that he was unable to control himself. *Id.* at 140. As a result of his molestation of this girl, Hendricks was adjudicated a sexual psychopath under Washington law and civilly committed to a mental institution for treatment until 1965, when he was released. *Id.* at 142-44. In 1967, Hendricks was again convicted and imprisoned for molesting another young boy and girl. *Id.* at 146-48. Hendricks had repeatedly performed oral sex on the 8-year-old girl and fondled the 11-year-old boy over a period of two months. *Id.* Again, Hendricks stated that he committed these crimes because he had an urge to do so which he did not even try to control. *Id.* at 149. After being released from prison in 1972, Hendricks did attend outpatient treatment for several months, but eventually he stopped appearing for appointments and did not respond to communications to reschedule or continue them. *Id.* at 151-59.

In 1973, Hendricks began a prolonged period of molesting his own stepdaughter and stepson. *Id.* at 157-64. He testified that he knew his behavior was a problem, but that he did not cease it or seek treatment. *Id.* at 160. Hendricks' stepdaughter testified that Hendricks performed oral sex on her several times a month from the time she was approximately 9 until she was 14. *Id.* at 196-97. She testified that, at one point, Hendricks found out that she had had sexual relations with a boy and threatened to tell her mother if she did not do what Hendricks wanted. *Id.* at 202. Hendricks also promised to do favors for her, such as letting her drive the car, in exchange for her allowing him to perform sexual acts on her. *Id.* at 203. Hendricks' stepson also testified that Hendricks performed oral sex on him and fondled his genitals approximately once a week from the time the stepson was about 9 until he was 14. *Id.* at 206-08. The stepson further testified that Hendricks also made him perform oral sex on Hendricks. *Id.* at 208. Again, as with his stepdaughter, Hendricks did favors for the boy, such as providing him with chewing tobacco, in exchange for sex. *Id.* at 208-09.

Hendricks' most recent conviction was in 1984 for the molestation of two 13-year-old boys, *id.* at 165-66, resulting in his serving ten years in prison before his scheduled release in 1994. At the time of these offenses, Hendricks told a police detective that he could not control his urge to touch the boys' penises. *Id.* at 167. Hendricks testified that he had spent half his life since 1955 in prison or in psychiatric institutions. *Id.* at 170. He further testified that when he suffers stress, he is unable to control the urge to engage in sexual activity with a child, declaring that "I can't control the urge when I get stressed out." *Id.* at 172. Hendricks acknowledged that his behavior causes grave harm to children, *id.* at 176, and

agreed that he is a pedophile. *Id.* at 153. Nonetheless, he testified that he believed that "some" of the children he molested enjoyed it, *id.* at 177, and that treatment is "bullshit." *Id.* at 190. Hendricks also testified that he did not believe he was cured of his pedophilia, *id.* at 181, and, in response to the question whether he could promise he would not molest children if released, he stated that "[t]he only way to guarantee that is to die." *Id.* at 190.

The chief psychologist at Larned State Hospital, Dr. Charles Befort, who interviewed and evaluated Hendricks for purposes of the trial court proceeding, testified that Hendricks is a pedophile and is likely to commit sexual offenses against children in the future if permitted. *Id.* at 247-48. Dr. Befort testified that, in his opinion, pedophilia is a "mental abnormality" within the meaning of the Act. *Id.* at 229-33. Dr. Befort also testified that he did not believe that Hendricks had a personality disorder, *id.* at 256, 277, nor, in his opinion, was Hendricks mentally ill within the meaning of the traditional Kansas civil commitment statute. *Id.* at 256, 268. Dr. Befort further testified that, in his opinion, Hendricks would commit new sexual offenses against children if released. *Id.* at 247-48. This opinion was based on Dr. Befort's belief that past behavior is a good predictor of future behavior, the fact that pedophilia commonly involves repeated behavior, Hendricks' failure to demonstrate that he can or desires to control his behavior, Hendricks' lack of understanding of the seriousness of his behavior, and Hendricks' lack of interest in treatment. *Id.* at 248-53. Dr. Befort also testified that, in 1985, Hendricks told a clinician that he acted on his sexual

impulses at least "once per month, twice a month." *Id.* at 241-42.[6]

The jury was instructed to determine whether Hendricks was a "sexually violent predator" and whether he suffered from a "mental abnormality" in language that tracked the statutory definitions of those terms virtually word for word. J.A. 359. The twelve-member jury unanimously returned a verdict finding that, beyond a reasonable doubt, Hendricks is a sexually violent predator within the meaning of the Act. *Id.* at 357-58, 360. The trial court then ordered Hendricks committed to the Larned State Hospital, *id.* at 361-65, where he has remained and is receiving treatment during the pendency of this litigation.[7]

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[6] A forensic psychiatrist Hendricks called as an expert witness, Dr. William Logan, testified that, in his opinion, treatment for sex offenders generally is ineffective, but he acknowledged that some studies show that recidivist rates for sex offenders were reduced from the 10-40% range to a 3-37.5% range with treatment, J.A. 328-29, and that recidivism rates for a child molester is affected by several factors, including "whether he's been treated or not." *Id.* at 349-50. Dr. Logan further testified that, in his opinion, psychiatrists and psychologists cannot accurately predict whether a sex offender is likely to engage in sexual predation in the future. *Id.* at 330-31.

[7] In 1995, while his appeal from the district court order committing him for long-term care and treatment was pending, Hendricks filed a state habeas corpus petition under Kan. Stat. Ann. § 60-1501, alleging that he was not receiving any treatment and, therefore, was entitled to release from the State's care. A state district court held a hearing on the petition on August 28, 1995, and received testimony from Dr. Befort and Janet McClellan, the program director of the Kansas sexual predator treatment unit, about the treatment program provided to sexual predators committed under the Act. J.A. 389-449. Based on their testimony, the district court concluded that Kansas was providing constitutionally adequate treatment and the court denied the request for relief. *Id.* at 451-55.

3. The Kansas Supreme Court's Decision

By a 3-1-3 vote, the Kansas Supreme Court held that the Act violates substantive due process. Pet. App. 1a-59a.

a. The Plurality Opinion

The focal point of the plurality's analysis was this Court's decision in *Foucha v. Louisiana*, 504 U.S. 71 (1992). *See* Pet. App. 9a-20a. In *Foucha*, this Court considered whether the State of Louisiana could continue to detain an insanity acquittee who the state conceded was no longer "mentally ill" but remained dangerous. By a 5-4 vote, with four separate opinions, the Court held that due process prohibited Louisiana from continuing to detain Foucha. The Kansas Supreme Court observed that, in *Foucha*, this Court relied in part on *Addington v. Texas*, 441 U.S. 418 (1979), as holding that a State is required by due process to prove by clear and convincing evidence that a person is both (1) mentally ill and (2) a danger to himself or others, in order to commit the person involuntarily in a civil proceeding. Pet. App. 11a.

The plurality rejected the argument that the constitutional "mental illness" requirement was met by the Act's definition of "mental abnormality." *Id.* at 14a-15a. Instead, the plurality read the preamble to the statute as disavowing any " 'notion that the targeted group of persons are mentally ill.' " *Id.* at 15a (quoting *Young v. Weston*, 898 F. Supp. 744, 749 (W.D. Wash. 1995), *appeal pending*). The plurality inferred that

> the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment

> for sexually violent predators is all but nonexistent. The legislature concedes that sexually violent predators are not amenable to treatment under [the general Kansas involuntary civil commitment statute]. If there is nothing to treat under [that statute], then there is no mental illness.

Id. at 15a.

Moreover, according to the plurality, for federal due process purposes, there is "no support in the Act that a finding of mental illness is required." *Id.* at 17a. "In other words, the record in this case will not support a finding that the statutory requirement of a mental abnormality or a personality disorder is equivalent to the *constitutional standard* of mental illness." *Id.* (emphasis added). The plurality relied on the testimony of Dr. Befort that pedophilia is not considered a personality disorder but is considered a mental abnormality. *Id.* at 18a. In the plurality's view, the term "mental abnormality" does not satisfy the *Foucha* standard of "mental illness" because it "is not a psychiatric or medical term but, rather, a legal term defined in the Act." *Id.* at 19a. The plurality observed that "[t]he term is not defined in DSM-III-R,"[8] *id.*, and "therefore could not be used appropriately in a formal diagnosis." *Id.* The plurality concluded that the definition of "mental abnormality" in the Act would not satisfy the definition of "mental illness" contained in the traditional Kansas involuntary civil commitment statute,

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[8] The reference is to the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. rev. 1987), discussed above in note 5. As pointed out in note 5, the most recent revision (1994) is referred to as DSM-IV. For purposes of this brief, the State of Kansas generally will refer to and rely upon DSM-IV, although with respect to pedophilia, there is very little, if any, difference in the two versions' discussion of that mental disorder.

which defines that term to mean a person who (1) is suffering from a severe mental disorder, (2) lacks capacity to make an informed decision concerning treatment and (3) is likely to cause harm to self or others. *Id.* (citing Kan. Stat. Ann. § 59-2902(h)). According to the plurality, "[a]bsent such a finding, the Act does not satisfy the constitutional standard set out in *Addington* and *Foucha*." Pet. App. 19a.

The plurality read *Foucha* as mandating a categorical rule that "to indefinitely confine as dangerous one who has a mental abnormality is constitutionally impermissible." *Id.* The plurality concluded that "Hendricks is not mentally ill, and the criminal offenses for which he was imprisoned were not the result of mental illness." *Id.* at 20a. Therefore, "the due process standard of *Addington* and *Foucha* is not met by the Act as applied to Hendricks." *Id.*

b. The Concurrence

The concurring justice, whose vote was decisive, observed that, "[w]ithout violating the Constitution, the State could have incarcerated Hendricks until he exhaled his last breath and his spirit departed this earth, but it did not." Pet. App. 22a (Lockett, J., concurring). He reluctantly agreed that the Kansas Act is unconstitutional, however, "[b]ecause the Washington act, which is almost identical and substantially similar legislation to the Kansas act, was declared unconstitutional by the federal court, and the reasoning of the majority follows the prior decisions of the Supreme Court of the United States. . . ." *Id.* at 24a.

c. The Dissent

The three dissenting justices began by noting that the plurality "fails to address directly what test should be

used to measure the constitutionality of a legislative act attacked on the basis of substantive due process." *Id.* at 33a. The dissent applied strict scrutiny, *id.* at 35a, although it observed that "the Supreme Court recently indicated in *Foucha* that our review might be somewhat less than strict scrutiny." *Id.* at 36a.

In contrast to the plurality, the dissent found *Foucha* distinguishable on the merits:

> It is immediately apparent that *Foucha* is unlike the present case in the very areas that made the Louisiana statute in *Foucha* most offensive. First, under our Act there is no mechanism whereby a person can be confined while mentally healthy solely on the basis of supposed dangerousness. Second, under our Act the burden of proving an ailment of the mind and dangerousness remains always on the State, and always at the high burden of beyond a reasonable doubt.

Id. at 39a-40a. According to the dissent, the plurality opinion "rests on the erroneous conclusion that our Act is constitutionally infirm because it requires no showing of mental illness. It seems to base this conclusion on the absence of those two words. Yet it is not the incantation of 'mental illness' that has constitutional significance, but the substance of the statute." *Id.* at 41a.

The dissent pointed out that " '[t]he Supreme Court has declined to enunciate a single definition that must be used as the mental condition sufficient for involuntary mental commitments. The Court has wisely left the job of creating statutory definitions to the legislators who draft state law.' " *Id.* at 41a-42a (quoting *State v. Post*, 197 Wis.2d 279, 304, 541 N.W.2d 115, 123 (1995)). Thus, "[t]he question is not whether Hendricks fits some clinical definition of mental illness, but whether he fit a legislative

classification that is more than mere idiosyncratic behavior 'within a range that is generally acceptable.' " Pet. App. at 42a (quoting *Addington*, 441 U.S. at 426-27).[9]

The dissenters opined that "[t]here is no justification for linking constitutional standards to the shifting sands of academic thought reflected in the DSM-IV and its frequent revisions," Pet. App. 44a, pointing out that manual's warning that " '[t]he clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments. . . . ' " *Id.* at 44a-45a (quoting DSM-IV, Cautionary Statement, xxvii).

The dissent deemed it " 'irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions.' " *Id.* at 46a (quoting *In re Young*, 122 Wash. 2d 1, 26, 857 P.2d 989, 1000 (1993)). The dissent also concluded that

> The Act is narrowly tailored in a number of particulars. First, it does not apply to sex offenders generally, or even to all sex offenders suffering some ailment of the mind, but applies only to those persons with an ongoing mental condition rendering them likely to commit acts of sexual violence. Second, it does not apply to those susceptible to less restrictive treatment, but only to those who require secure confinement to prevent such violence. Third, to reduce the risk of erroneous detention it does not apply to all persons accused of sexually violent offenses, but only those previously charged or

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[9] Earlier in the opinion, the dissent acknowledged that "[n]owhere is there any requirement that this 'sexually violent predator' must be 'mentally ill' as defined in [the general civil commitment statute]," Pet. App. 28a, although the dissent also aptly observed that "a person subject to the Act could hardly be considered to be mentally healthy." *Id.*

> convicted. Fourth, it does not apply in the face of meager, or even clear and convincing evidence, but requires the State to prove beyond a reasonable doubt that a person qualifies for confinement. Fifth, consistent with its narrowly focused goals, it requires treatment outside the Department of Corrections. Sixth, it has adequate provisions for continuing reviews to ensure that only those persons representing a continuing danger are confined and treated.

Pet. App. 46a.

SUMMARY OF ARGUMENT

Because the Kansas Sexually Violent Predator Act neither offends principles of justice so deeply rooted in the traditions of our people to rank as fundamental nor relies upon a suspect classification, the statute is presumptively constitutional and this Court should apply *reasonableness* review to Hendricks' substantive due process claim. This Court's decisions involving substantive challenges to laws involving mental illness and civil commitment, like its decisions involving such challenges to the substance of state criminal laws, uniformly have applied a reasonableness level of review. The Court repeatedly has recognized that limited federal review accords the proper deference to the States' traditional authority over the substance of their civil commitment and criminal justice systems. *Foucha v. Louisiana*, 504 U.S. 71 (1992), can and should be read as endorsing rather than altering this longstanding level of constitutional review.

The Kansas Act satisfies the basic substantive due process requirements this Court has set forth in past cases. These requirements apparently include proof of (1) *dangerousness* and (2) *mental illness* (neither of which the Court has defined in previous cases). First, the Kansas

Act requires evidence of past conduct and a prediction of likelihood to commit such offenses in the future in order to establish dangerousness, and there is no serious question that Hendricks' 40-year criminal record of sexually molesting children – coupled with his own testimony in this case – establishes his past, present and future *dangerousness* to some of the most vulnerable members of society. Second, for substantive due process purposes, the requirement of *mental illness* – a term this Court has never defined in its cases – is satisfied by the statutory requirement of proof that the person subject to commitment suffers from a "mental abnormality" – such as pedophilia, *see* DSM-IV at 527-28 – that is connected to both past and potential future dangerous conduct. To the extent there are differences of expert medical opinion regarding the diagnosis and classification of mental disorders, the Court previously has warned that courts must pay particular deference to reasonable legislative judgments. Surely it is reasonable for a state legislature to rely on legal concepts that incorporate recognized mental disorders, such as the pedophilia from which Hendricks suffers.

Finally, even if the Court were to apply strict scrutiny, the Kansas Act passes constitutional muster because it is narrowly tailored to serve the dual compelling interests of providing treatment to sexual predators and protecting society from such individuals. Certainly, the Act is more narrowly tailored than a criminal sentence of life imprisonment without parole, which indisputably would be a constitutional option for the State to implement in the circumstances presented. The State of Kansas reasonably has determined to provide Leroy Hendricks with the specialized treatment his condition requires while protecting the children of Kansas from the dire consequences of his unregulated conduct until such time as his mental

abnormality or dangerousness abates. The Kansas Sexually Violent Predator Act is constitutional.

ARGUMENT

THE KANSAS SEXUALLY VIOLENT PREDATOR ACT DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS PRINCIPLES

A. Reasonableness Review Applies To The Substantive Due Process Question

Statutes properly enacted by state legislatures are presumed constitutional, *Heller v. Doe*, 509 U.S. 312, 319 (1993), unless they involve either fundamental rights or suspect classes. *Id. See also City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). "So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.' " *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952), and *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)). This Court's "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Montana v. Egelhoff*, No. 95-566, slip op. at 5, 116 S. Ct. 2012, 20___ (1996) (plurality opinion). Hendricks' facial challenge to the Kansas statute, "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745. The fact that an "Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Id.*

This case involves neither a fundamental right nor a suspect class and therefore is subject to reasonableness

review. Hendricks – as the party challenging a properly enacted statute – thus bears the burden of establishing that the law is unconstitutional by demonstrating that there is no conceivable basis for the Act. *Heller*, 509 U.S. at 320. Importantly, this Court traditionally pays "particular deference to reasonable legislative judgments," *Jones v. United States*, 463 U.S. 354, 365 n. 13 (1983); *see also Marshall v. United States*, 414 U.S. 417, 427 (1974), when expert opinions differ on an issue such as what constitutes "mental illness."

1. This Court's Precedents Support The Application Of Reasonableness Review To Civil Commitments

This Court's decisions confirm that reasonableness review is the appropriate level of review in this case. The Court has *never* purported to apply strict scrutiny to a substantive due process or equal protection claim in an involuntary civil commitment case. Rather, the Court traditionally has applied reasonableness review, largely leaving the *substantive* aspects of state civil commitment statutes – as opposed to *procedural* requirements – to the States with little federal constitutional limitation. It is important that in this Court Hendricks has raised only a substantive, and not a procedural, due process challenge to the Kansas statute. This is not surprising, given that the Kansas statute requires the provision of counsel, the assistance of a mental health professional (at state expense, if necessary), a jury trial and proof beyond a reasonable doubt by the State, among other significant procedural protections.[10]

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[10] *See* Kan. Stat. Ann. § 59-29a05(c)(1) (counsel), -29a06 (counsel, mental health expert, jury trial), -29a07 (proof beyond a reasonable doubt). This difference distinguishes this case from a case such as *Specht v. Patterson*, 386 U.S. 605 (1967), in which

In cases involving substantive due process challenges to commitment systems, this Court has gone no further than to require that, as a constitutional matter, the State apparently must demonstrate that a person subject to commitment is both (1) "mentally ill" and (2) "dangerous." *See, e.g., Foucha*, 504 U.S. at 75-76 (citing *Addington v. Texas*, 441 U.S. 418 (1979)). Nor has the Court constitutionalized any particular definition of either "mental illness" or "dangerousness" as constitutional prerequisites to the invocation of state civil commitment proceedings.

For example, in *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940), the Court summarily rejected equal protection and due process challenges to a state statute that subjected sex offenders with a "psychopathic personality" to civil commitment proceedings. In *Pearson*, the Minnesota Supreme Court had construed the Minnesota statute to "include" persons "who, by an habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire." *Id.* at 273. This Court rejected any notion that the law violated substantive due process or that sexual psychopaths subject to the

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the Court struck down the Colorado Sex Offenders Act as violating *procedural due process* principles. In *Specht*, the Colorado statute essentially provided an alternative sentencing proceeding following conviction of a criminal offense but without providing the person with counsel, a hearing, the right to confront witnesses or the right to present evidence. *Id.* at 610. The Court took pains to point out that "[t]he case is therefore quite unlike the Minnesota statute we considered in *Minnesota v. Probate Court*, 309 U.S. 270." *Id.* (footnote omitted).

law were denied equal protection, finding that the question was simply "whether there is any rational basis for such a selection," *id.* at 274, and observing that "[w]e see no reason for doubt upon this point." *Id.*[11]

The law at issue in *Pearson* is known as a "sexual psychopath" law, a category of civil commitment statutes that originated in the 1930s in an effort to provide long-term care and treatment to recidivist sexual offenders, rather than simply punishing them criminally.[12] Sexual psychopath statutes "recognize that the sexual psychopath is neither normal nor legally insane and, for that reason, requires special consideration." *See* V. Woerner, Annotation, *Statutes Relating to Sexual Psychopaths*, 24 A.L.R.2d 350, 351 (1952). The objectives of such statutes were two-fold: "(1) to protect society by sequestering the sexual psychopath so long as he remains a menace to others, and (2) to subject him to treatment to the end that he might recover from his psychopathic condition and be rehabilitated." *Id.* Like this Court in *Pearson*, state courts generally have upheld these statutes against various constitutional challenges, including substantive due process, equal protection, double jeopardy, ex post facto, and self-

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[11] *See also* Katherine T. Blakey, *The Indefinite Civil Commitment of Dangerous Sex Offenders Is An Appropriate Legal Compromise Between "Mad" and "Bad" – A Study of Minnesota's Sexual Psychopathic Personality Statute*, 10 Notre Dame J. L., Ethics & Pub. Pol'y 227, 237-41 (1996) (discussing the *Pearson* decision). The Court more recently upheld a sexual psychopath law against constitutional challenge in *Allen v. Illinois*, 478 U.S. 364 (1986), rejecting the claim that such laws are criminal in nature and therefore governed by criminal procedure protections, such as the Fifth Amendment privilege against self-incrimination.

[12] *See* Racquel Blacher, Comment, *Historical Perspective of the "Sex Psycopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 Mercer L. Rev. 889, 897-98 (1995).

incrimination challenges. *See id.* at 352, 354-64. As one state supreme court concluded, sexual psychopaths are persons whom the State has "the power to classify as mentally ill and the right to confine and attempt to cure." *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 1256, 232 S.W.2d 897, 902 (1950). By 1960, at least twenty-six States and the District of Columbia had some form of sexual psychopath law[13] and, indeed, Hendricks himself was civilly committed under such a law in the state of Washington in 1964. J.A. 142-44. By 1990, approximately half the States had repealed their sexual psychopath laws as part of a trend to punish rather than treat sex offenders.[14] Some states, however, continue to utilize either the 1930s sexual psychopath laws, or a modern version.[15]

Thus, the recent move toward sexual predator statutes is not particularly novel or unprecedented but, instead, represents a return to treatment of sex offenders. One difference, however, between the 1930s vintage sexual psychopath laws and the recently enacted sex predator statutes is that the former generally provided for treatment in lieu of criminal punishment while the latter often provide for treatment after criminal punishment. For substantive due process purposes, this distinction should make no difference. Whether civil commitment precedes a criminal action, proceeds contemporaneously with such an action, or follows such proceedings, the substantive due process question remains one of defining the bases on which the State may provide for involuntary

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[13] *See* Blacher, *supra* note 12, at 903.

[14] *Id.* at 906-07.

[15] Minnesota, for example, has both its original statute, *see* Minn. Stat. § 526.09 *et seq.*, and a more recent sexually dangerous persons statute. *See* Minn. Stat. § 253B.02, subd. 7a, 18a, 18b.

civil commitment.[16] The choice a state makes in this regard is one the Court historically has reviewed only for *reasonableness*. *See, e.g., Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("the nature and duration of commitment [must] bear some *reasonable relation* to the purpose for which the individual is committed") (emphasis added); *see also O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Addington v. Texas*, 441 U.S. 418 (1979).

2. This Case Involves Neither A Fundamental Right Nor A Suspect Class

The State of Kansas does not question the proposition that individuals subject to involuntary civil commitment under sex predator statutes have a constitutionally protected liberty interest at stake. *See, e.g., Vitek v. Jones*, 445 U.S. 480, 492 (1980); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982); *Jones v. United States*, 463 U.S. 354 (1983); *Foucha*, 504 U.S. at 80. That interest, however, is not absolute and restrictions on that interest are not automatically subject to strict scrutiny. A contrary conclusion would result in the application of strict scrutiny to virtually all aspects of the States' criminal laws and criminal justice systems, including the substance of state criminal offenses and the punishments authorized under statutes or sentencing guidelines. The result would be chaos, as many aspects of the States' criminal justice systems undoubtedly would be invalidated by strict scrutiny review.

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[16] Any argument based on the timing of civil commitment proceedings with respect to possible or actual criminal proceedings is irrelevant to the substantive due process question. To the extent that such an argument may be relevant to Hendricks' contentions that the act violates double jeopardy or ex post facto principles, Kansas will address the argument in its brief responding on those issues.

In *Youngberg v. Romeo*, 457 U.S. 307 (1982), the Court made clear that the presence of a "liberty" interest protected by the Due Process Clause of the Fourteenth Amendment does not alone require the invocation of strict scrutiny. Rather, in addressing an involuntary civil committee's claim that he had due process rights to safe conditions and freedom from bodily restraint, the Court observed that liberty interests "are not absolute." *Id.* at 319-20. The Court declared that, "[i]n determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual' and 'the demands of an organized society.' " *Id.* at 320 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). The Court then articulated a reasonableness test, holding that " 'the Constitution only requires that the courts make certain that professional judgment [of mental health professionals] in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.' " *Id.* at 321 (quoting *Romeo v. Youngberg*, 644 F.2d 147, 178 (3d Cir. 1980) (en banc) (Seitz, C.J., concurring)).[17]

This Court recently observed that "[w]e have applied rational-basis review in previous cases involving the mentally retarded and the mentally ill." *Heller v. Doe*, 509 U.S. 312, 321 (1993). In *Heller*, the Court applied rational basis review in upholding Kentucky's use of different statutory civil commitment procedures for mentally

[17] *See also Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 279 (1990) ("determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests' " (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982) (footnote omitted)).

retarded as opposed to mentally ill persons.[18] In so doing, the Court cited two of its prior decisions for the proposition that strict scrutiny did not apply in such circumstances. The first case cited was *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), in which this Court rejected an equal protection challenge to a municipal ordinance that restricted the locations in which group homes for the mentally retarded could be operated. The Court also cited *Schweiker v. Wilson*, 450 U.S. 221 (1981), in which the Court rejected an equal protection challenge to a federal funding scheme that denied certain funds to residents of public mental institutions.

Thus, this Court's decisions dealing with substantive due process or equal protection challenges in civil commitment cases and cases involving persons suffering from various mental conditions uniformly apply rational basis or reasonableness review.[19] Certainly, the Court has not purported to apply strict scrutiny, nor has it recognized

[18] The parties in *Heller* apparently had agreed throughout the lower court proceedings that rational basis review was the appropriate level of review, and so this Court also applied that standard without deciding whether it was the proper level of review. 509 U.S. at 318-19.

[19] At least one state court expressly has applied rational basis review in addressing substantive due process and equal protection challenges to a state sexual psychopath statute. *See, e.g., People v. White*, 656 P.2d 690 (Colo. 1983) (Colorado Sex Offenders Act serves legitimate legislative objective and is rationally related to accomplishment of that objective); *People v. Kibel*, 701 P.2d 37 (Colo. 1985) (classification of sex offenders under Colorado act did not create suspect class or infringe on fundamental right). *See also* Simeon Schopf, *"Megan's Law": Community Notification and the Constitution*, 29 Colum. J.L. & Soc. Probs. 117, 122-27 (1995) (concluding that sex offenders are not a suspect class under this Court's cases, nor do community notification laws infringe on any fundamental rights).

the presence of either fundamental rights or a suspect class that would warrant a heightened level of review.

3. Reasonableness Review Accords The Proper Respect To The States

Important in this case is the Court's historic respect for federalism in the involuntary commitment context:

> The States have traditionally exercised broad power to commit persons found to be mentally ill. The substantive limitations on the exercise of this power and the procedures for invoking it vary drastically among the States. The particular fashion in which the power is exercised – for instance, through various forms of civil commitment, defective delinquency laws, sexual psychopath laws, commitment of persons acquitted by reason of insanity – reflects different combinations of distinct bases for commitment sought to be vindicated.

Jackson v. Indiana, 406 U.S. 715, 736-37 (1972) (footnotes omitted). The same is true of the Court's approach to the States' criminal laws. As one Justice recently noted, the "States enjoy wide latitude in defining the elements of criminal offenses. . . . " *Montana v. Egelhoff*, slip op. at 3, 116 S. Ct. at 20___ (1996) (Ginsburg, J., concurring in the judgment). Thus, "[w]hen a State's power to define criminal conduct is challenged under the Due Process Clause, we inquire only whether the law 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Id.* (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)); *see also* slip op. at 9, 116 S.Ct. at 20___ (plurality opinion) (stating the same principle).

Application of reasonableness review to the substance of state involuntary commitment systems reflects a proper respect for federalism. In *Addington v. Texas*, 441 U.S. 418, 431 (1979), a civil commitment case, the Court

declared that "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold."[20] Particularly when a state legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." *Marshall v. United States*, 414 U.S. 417, 427 (1974). In addressing the substantive due process requirement of dangerousness, this Court has rejected the argument that legislative choices necessarily must be justified by empirical, scientific or medical evidence, rather than ordinary reasonableness.

> We do not agree with the suggestion that . . . power to legislate in this area depends on the research conducted by the psychiatric community. . . . The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to *reasonable* legislative judgments.

Jones v. United States, 463 U.S. 354, 365 n. 13 (1983) (emphasis added).[21]

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[20] *See also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("Denial of the right [of the States] to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[21] The "choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge [of right and wrong] should determine criminal responsibility." *Leland v. Oregon*, 343 U.S. 790, 801 (1952). In rejecting the argument that the Constitution requires States to recognize alcoholism as a defense to a criminal charge of public intoxication, this Court warned that

Thus, this Court's precedents, as well as principles of federalism, strongly point toward the conclusion that reasonableness review – not strict scrutiny – applies to Hendricks' substantive due process challenge to the Kansas Sexually Violent Predator Act.[22]

> We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.
>
> Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. . . . [F]ormulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.

Powell v. Texas, 392 U.S. 514, 535-37 (1968) (Marshall, J.) (plurality opinion) (footnote omitted). *See also Montana v. Egelhoff*, No. 95-566, 116 S. Ct. 2012 (1996) (plurality opinion) (holding that due process does not require a State to permit a voluntary intoxication defense to a criminal charge).

[22] As demonstrated below in subpart C., even were this Court to apply strict scrutiny, the Kansas statute would pass constitutional muster, as the dissenting Justices of the Kansas Supreme Court concluded in this case. *See* Pet. App. 46a.

4. This Court's Decision In *Foucha v. Louisiana* Can And Should Be Read As Applying A Reasonableness Test

The lower court decisions addressing the constitutionality of sex predator statutes have turned in part upon their understanding that this Court's decision in *Foucha v. Louisiana*, 504 U.S. 71 (1992), requires the application of heightened scrutiny. *Foucha* does not so hold, however; indeed, that reading of *Foucha* is incorrect. All of the opinions in *Foucha* indicate that the Court was applying a reasonableness standard to Foucha's substantive due process claims. The members of this Court, however, disagreed on whether it was reasonable to make Foucha bear the burden of affirmatively establishing that he was no longer dangerous and could be released safely.

Justice White's opinion for the Court expressly referred to *reasonableness*; it never mentioned strict scrutiny. The opinion declared that "[d]ue process requires that the nature of commitment bear *some reasonable relation* to the purpose for which the individual is committed." *Foucha*, 504 U.S. at 79 (emphasis added). Even in Part III of the opinion, which spoke only for a plurality, strict scrutiny was not invoked in addressing Foucha's equal protection claim. *See id.* at 86 (observing that the "State must have a particularly convincing reason" to support having different commitment and release procedures for insanity acquittees).[23] Similarly, Justice O'Connor, who provided the fifth vote for the outcome in *Foucha*, did not purport to apply strict scrutiny. Rather,

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[23] In past decisions, Justice White had expressed strong distrust of intrusive judicial review under the rubric of substantive due process analysis, pointing out that "the substantive content of the Clause is suggested neither by its language nor by preconstitutional history." *Moore v. City of East Cleveland*, 431 U.S. 494, 543-44 (1977) (White, J., dissenting).

she acknowledged that " '[t]he only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment. . . . ' " *Id.* at 87 (O'Connor, J., concurring) (quoting *Jones v. United States*, 463 U.S. 354, 365 n. 13 (1983)). She further admonished that "[g]iven this uncertainty, 'courts should pay particular deference to reasonable legislative judgments' about the relationship between dangerous behavior and mental illness." *Id.* Likewise, Justice Kennedy's dissent declared that "upon compliance with *In re Winship* [397 U.S. 358 (1970)], the State may incarcerate on any *reasonable* basis." 504 U.S. at 93 (Kennedy, J., dissenting) (emphasis added).

Justice Thomas, in his dissent joined by the Chief Justice and Justice Scalia, expressly articulated the level of review he was applying to the Louisiana statute at issue. Justice Thomas made clear that, in his view, strict scrutiny did *not* apply to Foucha's substantive due process claim:

> Certain substantive rights we have recognized as "fundamental"; legislation trenching upon these is subjected to "strict scrutiny," and generally will be invalidated unless the State demonstrates a compelling interest and narrow tailoring. Such searching judicial review of state legislation, however, is the exception, not the rule, in our democratic and federal system; we have consistently emphasized that "the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable." Except in the unusual case where a fundamental right is infringed, then, federal judicial scrutiny of the substance of state legislation under the Due Process Clause of the Fourteenth Amendment is not exacting.

Id. at 115 (Thomas, J., dissenting) (quoting *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985)).

Justice Thomas observed that "this Court has *never* applied strict scrutiny to the substance of state laws involving involuntary confinement of the mentally ill, much less to laws involving the confinement of insanity acquittees." *Id.* at 119 (emphasis original). Reading *Foucha* to apply a heightened level of review would work

> a revolution in the treatment of the mentally ill. Civil commitment as we know it would almost certainly be unconstitutional; only in the rarest of circumstances will a State be able to show a "compelling interest," and one that can be served in no other way, in involuntarily institutionalizing a person. All procedures involving the confinement of insanity acquittees and civil committees would require revamping to meet strict scrutiny.

Id. at 122. Thus, the reading of *Foucha* which comports with this Court's precedent and its historical respect for federalism is that *reasonableness* review applies to substantive due process claims made in the civil commitment context. Nothing in the several opinions in *Foucha* prevents the Court from reinforcing that traditional understanding.

B. The Kansas Sexually Violent Predator Act Comports With Due Process

1. Due Process At Most Requires Proof Of Dangerousness And A Mental Condition That Reasonably Can Be Characterized As "Mental Illness"

This Court has held that the Due Process Clause of the Fourteenth Amendment "contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.' " *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331

(1986)). The constitutionality of the Kansas Sexually Violent Predator Act thus turns upon the interpretation of a line of this Court's decisions that address substantive due process claims in the mental health context. As explained below, these decisions apparently establish that the State must prove that Hendricks is both (1) *dangerous* and (2) *mentally ill*. *See Foucha*, 504 U.S. at 75-76. The decisions have not, however, defined the term "mental illness," and certainly have not confined it to any particular clinical categories.

In *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975), this Court held that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." The jury in *Donaldson* specifically found that "Donaldson was neither dangerous to himself nor dangerous to others." *Id.* at 573. *Donaldson* stands for the proposition that the mentally ill cannot be involuntarily committed absent proof of dangerousness, *i.e.*, they cannot be warehoused, for example, simply to get them out of the public's sight.

In *Addington v. Texas*, 441 U.S. 418 (1979), a procedural due process case, the Court held that involuntary commitment proceedings require proof that the individual satisfies the State's substantive standards for commitment by clear and convincing evidence. The Texas law at issue required proof of both mental illness and dangerousness. *Id.* at 426. Although *Addington* was not a substantive due process case, later decisions of this Court have treated the Texas statutory elements of mental illness and dangerousness as substantive due process requirements. For example, *Jones v. United States*, 463 U.S. 354 (1983), held that a defendant acquitted of a crime by reason of insanity could be confined to a mental institution until such time as he either regained his sanity or no longer presented a danger to himself or society, citing

Addington for the proposition that "the Due Process Clause requires the State in a civil-commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous." *Id.* at 362.

Foucha, upon which the Kansas Supreme Court principally relied, repeated this formulation, holding that "keeping Foucha against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness." 504 U.S. at 78. Like the earlier cases, however, the Court had no occasion to define the requisite "mental illness" in *Foucha* because "Louisiana [did] not contend that Foucha was mentally ill at the time of the trial court's hearing." *Id.* Moreover, the Louisiana statute at issue in *Foucha*, unlike the Kansas statute at issue here, placed the burden of proof on Foucha to prove that he was not dangerous, and the record contained no affirmative testimony that Foucha would in fact pose a danger to the community, only testimony by mental health professionals that they would not state with certainty that he posed no danger. *Id.* at 81-82.

2. The Kansas Act Satisfies The Dangerousness Requirement

In this case, there is no question that the dangerousness requirement is satisfied. The Act can be invoked only when a person "has been convicted of or charged with a sexually violent offense," Kan. Stat. Ann. § 59-29a02(a), and "suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence. . . . " *Id.* Thus, the statute requires proof of more than predisposition or the possibility of predisposition; in fact, it requires evidence of past sexually violent behavior or conduct and a mental condition that creates a likelihood of such conduct in the future if the person is not committed and treated.

Indeed, neither the plurality nor the dissenting opinion in the Kansas Supreme Court expressed any doubt that the Act satisfies the constitutional "dangerousness" requirement, nor did Hendricks raise such a contention in his response to the State's petition for a writ of certiorari in this Court. Moreover, the Act's dangerousness element is more substantial than the general Kansas civil commitment statute which requires a showing that the person "[i]s likely, in the reasonably foreseeable future, to cause substantial physical injury or physical abuse to self or others or substantial damage to another's property, as evidenced by behavior causing, attempting or threatening such injury, abuse or damage." Kan. Stat. Ann. § 59-2902(g). The Act's requirement of proof of either criminal charges or a conviction, in addition to proof that the predator is likely to commit such offenses in the future, requires the State to prove considerably more than is required under the general civil commitment statute. Under the Act, the State had to prove, beyond a reasonable doubt, that Hendricks poses a danger to people – such as young children – not just a danger to "property." Hendricks has not, and realistically could not, question the constitutional adequacy of the Kansas civil commitment statute in this respect. *See, e.g., In re Albright*, 17 Kan. App. 2d 135, 138-43, 836 P.2d 1, 3-6 (1992) (rejecting constitutional challenge to § 2902(g)).

In sum, the Act requires evidence of conduct or behavior, not just speculation, that is connected to an abnormal mental condition and which supports a prediction of future dangerousness to innocent victims.[24] The

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[24] Although the precise levels of recidivism for various categories of sex offenders are the subject of some dispute due to a range of estimates presented in numerous studies, there is no serious dispute that recidivism rates are significant, particularly in some categories, such as pedophiles/child molesters. For example, one study concluded that "[t]he most impressive finding is the enormously high frequency of paraphiliac behaviors reported by various categories of paraphilia," G. G. Abel, *et al.*, *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 Journal of Interpersonal Violence 3, 21 (Mar. 1987), pointing out that the number of offenses reported by "nonincarcerated child molesters was from *23.2 acts to 281.7 acts per offender.*" *Id.* (emphasis added). *See also The Handbook of Sexual Assault* 15 (1990) (W.L. Marshall, *et al.* eds) (presenting statistics in table format). Hendricks' expert in this case, Dr. William Logan, testified that the "general consensus in the field" is that conviction rates underestimate the true extent of recidivism among sexual offenders. J.A. 322.

danger Leroy Hendricks presents to the children of any community in which he might reside if released is all too obvious from his past 40-year criminal record[25] of indiscriminately molesting boys and girls ranging in age from 7 to 14, and his own testimony in the trial court proceedings in this case. The Act indisputably satisfies the substantive due process requirement of dangerousness.

3. The Kansas Act Requires Constitutionally Adequate Proof Of Mental Illness

The only due process issue in this case is whether the Act's requirement of either a "personality disorder," or a "mental abnormality," such as Leroy Hendricks' diagnosis of "pedophilia" – a recognized "mental disorder," *see* DSM-IV at 527-28 – suffices as proof of "mental illness" for constitutional purposes.

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[25] "The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness." *Jones v. United States*, 463 U.S. 354, 364 (1983).

a. Constitutional Requirements Are Satisfied By Proof Of A Recognized Mental Condition

The Kansas Sexually Violent Predator Act defines a "sexually violent predator" as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence, if not confined in a secure facility." Kan. Stat. Ann. § 59-29a02(a). The Act further provides that " '[m]ental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." § 59-29a02(b). Thus, in order to commit Hendricks under the Act, the State was required to prove that Hendricks suffers from either a "mental abnormality" or a personality disorder that makes him a dangerous sexual predator.

At the sexual predator trial, Dr. Charles Befort, the chief psychologist at a state mental hospital, testified that ordinarily a "mental abnormality" is not a formal diagnosis, and is not defined in DSM-III, but is a clinical phrase used to discuss abnormality or deviance. J.A. 229-33. He further testified that he did not diagnose Hendricks as having a personality disorder, *id.* at 256, 277, nor did he believe him to be "mentally ill" within the meaning of the Kansas civil commitment statutes. *Id.* at 256, 268. Dr. Befort offered his opinion, however, that Hendricks is a pedophile with a mental abnormality that makes him likely to engage in predatory acts of sexual violence or sexual activity with children if given the opportunity. *Id.* at 229-33, 247-48. Because the jury concluded, beyond a reasonable doubt, that Hendricks is a dangerous sexual predator who suffers from a "mental

abnormality," *id.* at 357-58, 360, the question presented to this Court is whether the statutory definition of "mental abnormality" satisfies the constitutional "mental illness" requirement.

In the line of decisions discussed above, this Court has never purported or attempted to define "mental illness" for substantive due process purposes. Although the Court has referred to proof of "mental illness" as a constitutional requirement, the Court itself has utilized various terms in its opinions such as "mental disorder," "mental disease," "emotional disorder," "emotionally disturbed," and "insane." *See, e.g., Addington v. Texas*, 441 U.S. 418, 425-26 (1979).[26] The Court's use of this variety of terminology is not surprising, given the Court's recognition that "psychiatrists disagree widely and frequently on what constitutes mental illness." *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985).

Indeed, there is no single, medically accepted definition of mental illness. For example, the term "mental illness" is not defined in DSM-IV, which is neither in design or fact prepared for legal purposes, but rather as an explanation of current thought among the medical community. The manual itself cautions that

> although this manual provides a classification of mental disorders, it must be admitted that no

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[26] *See also O'Connor v. Donaldson*, 422 U.S. 563, 573-74 (1975) (declining to decide when "a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement"); Andrew Hammel, Comment, *The Importance of Being Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes as Insane Acts*, 32 Hous. L. Rev. 775, 799 (1995) ("the Court has never attempted to articulate a clear due process standard for the permissible substantive content of statutory definitions of mental illness").

> definition adequately specifies precise boundaries for the concept of "mental disorder." The concept of mental disorder, like many other concepts in medicine and science, lacks a consistent operational definition that covers all situations. . . .

DSM-IV at xxi. Indeed, the manual recognizes that "[i]n determining whether an individual meets a specified legal standard . . . , additional information is usually required beyond that contained in the DSM-IV diagnosis." *Id.* at xxiii. The manual specifically warns that

> [i]t must be noted that DSM-IV reflects a consensus about the classification and diagnosis of mental disorders derived at the time of its initial publication. New knowledge generated by research or clinical experience will undoubtedly lead to an increased understanding of the disorders included in DSM-IV, to the identification of new disorders, and to the removal of some disorders in future classifications. The text and criteria sets included in DSM-IV will require reconsideration in light of evolving new information.

Id.

The term "mental abnormality" does not have a clinical definition, but neither do other legal concepts in mental health law such as "insanity" or "competency." "It is by now well established that insanity as defined by the criminal law has no direct analog in medicine or science." *Foucha*, 504 U.S. at 96 (Kennedy, J., dissenting). Rather, the statutory definition of "mental abnormality" becomes meaningful when mental health professionals give the definition content by identifying specific mental disorders that may or may not satisfy the definition. It is clear that trained professionals can give content to the statutory requirements of "personality disorder" or "mental abnormality" contained in the Kansas Act.

For instance, "paraphilias," as defined by DSM-IV, are characterized by "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) non-human objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons, that occur over a period of at least 6 months." DSM-IV at 522-23. A paraphilia diagnosis will not include one-time occurrences, nor do occurrences attributable to mental retardation, dementia, substance abuse or schizophrenia satisfy the conditions for diagnosis. *Id.* at 525. Not all deviant sexual behavior constitutes a paraphilia, and not all paraphilias will constitute a "mental abnormality" under the statute. At least two specific and well-recognized paraphilias, however, do satisfy the statutory definition of "mental abnormality." These include *pedophilia* (Hendricks' diagnosis), and *sexual sadism*. *See id.* at 527-28, 530.

Thus understood, the Kansas statute clearly is distinguishable from the situation the Court addressed in *Foucha*. In *Foucha*, the uncontroverted evidence in the trial court was that "there had been no evidence of mental illness since [Foucha's] admission," 504 U.S. at 74, and that Foucha mentally was in "good shape." *Id.* at 75. Nonetheless, under Louisiana law, Foucha (as an insanity acquittee) had the burden of affirmatively establishing that he posed no danger to society if released from confinement. By contrast, Hendricks' diagnosis in this case was that he displays the paraphilia of "pedophilia," a recognized mental disorder. Thus, the Kansas "mental abnormality" requirement – both on its face and as applied in this case – is constitutionally sufficient.

The mere fact that the Kansas statute speaks in terms of a "mental abnormality" and not "mental illness" cannot alone be of any constitutional significance. Thus, the Kansas Supreme Court erred in concluding that the Act failed to satisfy the constitutional "mental illness" requirement simply because the preamble recognizes that

sex predators might not be subject to involuntary commitment under the general Kansas commitment statutes and that they require different treatment methods and often longer periods of treatment than other persons subject to involuntary commitment. The Kansas Legislature did not use the term "mental abnormality" to circumvent or water down substantive due process requirements, but rather to limit the Act's reach to a specific and narrow group of sex offenders who suffer from identifiable mental disorders that make them particularly dangerous to society generally, and to some of the most vulnerable members of society in particular.[27]

For substantive due process purposes, the real question is whether mental health professionals trained in the identification and diagnosis of sexual pathologies are able to identify specific mental disorders, such as pedophilia in Hendricks' case, which in the past have led the person to commit sexually violent offenses and likely will cause the individual to do so in the future if released without treatment. There can be no doubt that the answer to that question is "yes."

b. The Act Requires Treatment Of Sex Predators

To the extent the Kansas Supreme Court may have relied on the notion that Hendricks' mental condition – pedophilia – either was not treatable or would not be

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[27] This Court generally eschews inquiry into legislative motives or purposes and relies instead on the language of the statute itself. Indeed, this Court long has recognized that judicial investigations into legislative motives are a hazardous matter. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 384 (1968). Generally, the Court will not attribute to a legislature the "intent to pass legislation that is inconsistent with the Constitution as construed by this Court." *United States v. X-Citement Video, Inc.*, 513 U.S. ___, ___, 115 S. Ct. 464, 470 (1994).

treated,[28] that court was simply in error. The preamble to the Act does not declare that sex predators are untreatable or will not receive treatment. Rather, the legislature found that "the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under" the general civil commitment statute. § 59-29a01. Moreover, the statute affirmatively requires that "[t]he involuntary detention or commitment of persons under this act shall conform to constitutional requirements for care and treatment." § 59-29a09. With respect to Hendricks' facial challenge to the Act, that is the end of the matter. On its face, the Act requires treatment, and it is Hendricks' burden to "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Moreover, even as applied, Hendricks' challenge must fail in this respect. Two Kansas courts have made a factual determination – with respect to Hendricks himself – that Kansas is providing treatment to its sex predators. Following a hearing on Hendricks' motion for a new trial in this case, the trial court denied the motion, concluding that "I feel that the arguments of the defendant in regards to there not being a treatment program available are not sufficient because I believe that the Secretary of Social and Rehabilitation Services has established a treatment program." J.A. 387.

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[28] *See* Pet. App. 15a ("Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. The legislature concedes that sexually violent predators are not amenable to treatment under K.S.A. § 59-2901 *et seq.* If there is nothing to treat under 59-2901, then there is no mental illness.").

At an August 28, 1995, hearing on a petition by Hendricks for habeas corpus relief under Kansas law – again on the ground that the State's sexual predator treatment program was inadequate – two state officials testified regarding the Kansas program. The first was Dr. Charles Befort, the same psychologist who testified in Hendricks' sexual predator trial. Dr. Befort explained that the program "has plenty of funding and we have lots of space." *Id.* at 395. He acknowledged that the program had taken some time to get up and running, *id.* at 405-06, but testified that "the foundation for an excellent program is laid" and it was "about ready to start up full steam." *Id.* at 413. He also explained that some delays are inherent in establishing a program of this nature. *Id.* at 413-15. The other witness was Janet McClellan, the program director for the Kansas sexual predator treatment unit. She testified that Kansas had started the program from scratch following the enactment of the statute and that some delays had occurred in implementing the program but that, as of the date of the hearing, the program was nearly fully staffed and operational. *Id.* at 421-47. On the basis of this evidence, the trial court ruled that "I have to conclude that the allegation that no treatment is being provided to any of the petitioners or other persons committed to the program designated as a sexual predator treatment program is not true. I find that they are receiving treatment." *Id.* at 453-54.

The notion that the State should provide treatment to those involuntarily committed to state mental institutions has never been understood to mean that the State necessarily must succeed in "curing" the individual committed. Otherwise, the States might be constitutionally compelled to release all sorts of committed individuals who are both mentally ill and dangerous simply because the State cannot "cure" them of their afflictions. Nor should the Court impose a constitutional requirement

that a treatment program must result in significant improvements in recidivism rates in order for the patient's condition to qualify as "mental illness" for substantive due process purposes. Treatment sometimes is ineffective, or less than fully effective, for the simple reason that the individual refuses to cooperate, as Leroy Hendricks apparently refused for many years. Moreover, "it remains a stubborn fact that there are many forms of mental illness which are not understood, some which are untreatable in the sense that no effective therapy has yet been discovered for them, and that rates of 'cure' are generally low." *O'Connor v. Donaldson*, 422 U.S. 563, 583 (1975) (Burger, C.J., concurring). But that does not automatically transform a treatment program into a criminal sentence or other form of punishment. It should be the State's efforts to treat the committed individual, and not necessarily the State's success in doing so, which ultimately determines whether the constitutional "mental illness" standard is satisfied. Indeed, a number of studies have reported success in treating sex offenders.[29]

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[29] *See, e.g.*, Mary Barker, *What Do We Know About the Effectiveness of Cognitive-Behavioral Treatment for Sex Offenders?*, 2 J. Mental Health 97 (1993); Ann S. Fordham, *An Evaluation of Sex Offender Treatment Programmes*, 19 Issues in Criminalogical & Legal Psychology 60 (1993); Margit C. Henderson *et al.*, *Sexually Deviant Behavior and Schizotypy: A Theoretical Perspective with Supportive Data*, 61 Psychiatric Quarterly 273 (1990); William L. Marshall & W.D. Pithers, *A Reconsideration of Treatment Outcome with Sex Offenders*, 21 Criminal Justice & Behavior 11 (1994); William L. Marshall, *The Treatment of Sex Offenders: What Does Outcome Data Tell Us?*, 8 J. Interpersonal Violence 524 (1993); William L. Marshall *et al.*, *Treatment Outcome with Sex Offenders*, 11 Clinical Psychology Rev. 465 (1991); Daniel L. Whitaker *et al.*, *Treatment of Sexual Offenders in a Community Mental Health Center: An Evaluation*, 7 J. Social Work & Human Sexuality 49 (1988).

In *Allen v. Illinois*, 478 U.S. 364 (1986), this Court held that commitment proceedings under the Illinois Sexually Dangerous Persons Act, a sexual psychopath statute, were not "criminal" within the meaning of the Fifth Amendment's privilege against self-incrimination. In reaching that conclusion, the Court recognized that the Illinois law's purpose – like the Kansas law in this case – was to provide treatment, not punishment, for persons adjudged sexually dangerous. *Id.* at 370. The Court concluded that the petitioner had not demonstrated that the conditions of confinement were "incompatible with the State's asserted interest in treatment," *id.* at 373, and the Court observed that committed individuals were treated differently than convicted felons. *Id.* at 373-74.

Although *Allen* involved a Fifth Amendment question, and not a substantive due process claim, many of the Court's observations ring true with respect to the Kansas Sexually Violent Predator Act in the substantive due process context.[30] The stated purpose of the Kansas

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[30] Two state supreme courts have relied upon *Allen* in part to reject substantive due process challenges to sexual predator statutes that are virtually identical to the Kansas Sexually Violent Predator Act. *See In re Young*, 122 Wash.2d 1, 19-21, 25, 857 P.2d 989, 997, 1000 (1993) (upholding the Community Protection Act of 1990, Wash. Rev. Code § 71.09 *et seq.*); *State v. Post*, 197 Wis.2d 279, 307-11, 541 N.W.2d 115, 124-26 (1995), *cert. pending*, No. 95-8204 (upholding the Sexually Violent Person Commitments Act, Wis. Stat. ch. 980). A number of commentators have concluded that sexual predator laws are constitutional. *See, e.g.*, Blakey, *supra* note 11; Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. Puget Sound L. Rev. 709 (1992); Matthew J. Herman, Note, *Are the Children of Illinois Protected from Sex Offenders?*, 28 J. Marshall L. Rev. 883 (1995); Marie A. Bochnewich, *Prediction of Dangerousness and Washington's Sexually Violent Predator Statute*, 29 Cal. W. L. Rev. 277 (1992); Norm Maleng, *The Community Protection Act and the Sexually*

law is to provide treatment to sexually violent offenders, *see* Kan. Stat. Ann. § 59-29a01, and, indeed, the State of Kansas has gone to considerable expense and effort to establish a meaningful treatment program. Requiring the commission of a sexually violent offense in order to trigger the Act and providing procedural safeguards such as representation by counsel, the assistance of a mental health professional (at State expense, if necessary), a jury trial, and a requirement of proof beyond a reasonable doubt simply do not, under *Allen*, invalidate or undermine the State's interest in treatment. Likewise, housing committed sex predators in a secure mental health facility, where they receive treatment and are not treated like convicted felons in an ordinary prison, is completely consistent with the State's treatment objectives.

C. Even Were This Court To Apply Strict Scrutiny, The Kansas Sexually Violent Predator Act Passes Muster

Finally, even if this Court determines that strict scrutiny is the appropriate level of review to apply to the Kansas statute in evaluating Hendricks' substantive due

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Violent Predators Statute, 15 U. Puget Sound L. Rev. 821 (1992); Andrew Horwitz, *Sexual Psychopath Legislation: Is there Anywhere to go but Backwards?*, 57 U. Pitt. L. Rev. 35 (1995); Kelly A. McCaffrey, Comment, *The Civil Commitment of Sexually Violent Predators in Kansas: A Modern Law for Modern Times*, 42 Kan. L. Rev. 887 (1994); David Boerner, *Predators and Politics: A Symposium on Washington's Sexually Violent Predators Statute*, 15 U. Puget Sound L. Rev. 525 (1992); Juliet Dupuy, Comment, *The Evolution of Wisconsin's Sexual Predator Law*, 79 Marq. L. Rev. 873 (1996); Claudine M. Leone, *New Jersey Assembly Bill 155 – A Bill Allowing the Civil Commitment of Violent Sex Offenders After the Completion of a Criminal Sentence*, 18 Seton Hall Legis. J. 890 (1994); Sarah H. Francis, Note, *Sexually Dangerous Person Statutes: Constitutional Protections of Society and the Mentally Ill or Emotionally-Driven Punishment?*, 29 Suffolk L. Rev. 125 (1995).

process claim, the outcome remains the same. Strict scrutiny requires that the State demonstrate that the challenged statute both (1) serves a compelling governmental interest and (2) is narrowly tailored to advance that interest. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. ___, 115 S. Ct. 2097, 2117-18 (1995). Although strict scrutiny involves a more intensive and rigorous judicial inquiry than reasonableness review, this Court recently expressed its desire "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' " *Id.* at 2117 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (Marshall, J., concurring in judgment) (1980)).

The Kansas statute satisfies both requirements of the strict scrutiny test. First, the States without a doubt have compelling interests in treating sexual predators and protecting the public from them. No court has suggested otherwise, nor can such a suggestion seriously be made. Leroy Hendricks alone has been *convicted* of committing sexual offenses against no fewer than ten young children, ranging in age from 7 to 14. The impact of his conduct on his young and vulnerable victims is difficult to fathom and unquestionably significant.

Second, the Act is narrowly tailored to advance the State's dual interests of treating the individual and protecting the community. The Act applies only to persons who have committed sexually violent offenses and who suffer from an identifiable mental disorder which renders them likely to continue committing acts of sexual violence. § 59-29a02(a), (b). The Act does not apply to those who have unacceptable fantasies; it only applies to persons who have actually been charged with or convicted of sexually violent offenses. § 59-29a02(a). In accordance with the goal of treatment, the Act requires that persons committed under it be located and receive treatment either in a facility outside the state prison system or, if housed in correctional facility, in segregation from the inmate population. § 59-29a07(a). The Act specifically requires regular reviews of each committed individual's

situation to ensure that only those persons who continue to suffer from a mental condition and who represent a continuing danger to society remain in the State's custody for treatment, § 59-29a08, as well as providing for petitions for release initiated by either the person or the state agency responsible for treating the person. §§ 59-29a10, 59-29a11. Lastly, the Act provides significant procedural protections such as representation by counsel, Kan. Stat. Ann. § 59-29a05(c)(1), -29a06, the assistance of a mental health expert (at State expense, if necessary), § 59-29a06, a jury trial, *id.*, and proof by the State beyond a reasonable doubt. § 59-29a07.

Certainly, the Kansas Sexually Violent Predator Act is more narrowly tailored than would be a statute imposing life imprisonment on all repeat child molesters, an option that is indisputably constitutional. Likewise, it is more narrowly tailored than simply expanding the "mental illness" definition already contained in the traditional Kansas civil commitment statute. Because the latter option undoubtably would give rise to substantial constitutional questions of the type raised in this case, life imprisonment without parole for all repeat sex offenders may be the only realistic alternative remaining to the States if laws such as the Kansas Sexually Violent Predator Act violate substantive due process principles.

The Kansas Sexually Violent Predator Act is constitutional. It provides for the civil commitment – with extensive procedural safeguards – of sexually violent predators such as Hendricks, who has a medically recognized mental disorder, who repeatedly has committed sexually violent offenses, and who, by his own admission, will continue to prey on vulnerable children if released without treatment. The State of Kansas reasonably has decided to provide Hendricks with the specialized psychiatric treatment he so desperately needs while protecting the children of Kansas from the shattering consequences of his sexual abuse. The Constitution should not be interpreted to condemn these efforts.

CONCLUSION

For the foregoing reasons, Petitioner State of Kansas respectfully requests that this Court reverse the decision of the Kansas Supreme Court and hold that the Kansas Sexually Violent Predator Act does not violate substantive due process principles.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF KANSAS,
Petitioner and Cross Respondent

v.

LEROY HENDRICKS,
Respondent and Cross Petitioner

On Writs of Certiorari to the Supreme Court of Kansas

BRIEF FOR LEROY HENDRICKS CROSS-PETITIONER

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QUESTIONS PRESENTED

1. Is the Kansas Act providing for long term, indefinite confinement of sexually violent predators, K.S.A. 59-29a01 *et seq.*, even though labeled a civil proceeding, so punitive either in purpose or effect as to require that it must be considered criminal?

2. Does the Kansas Sexually Violent Predator Act violate the constitutional prohibition against *ex post facto* laws?

3. Does the Kansas sexually violent predator act violate the constitutional prohibition against double jeopardy?

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OPINIONS BELOW

The opinion of the Supreme Court of Kansas (Pet. App. 1a-59a) is reported at 259 Kan. 246, 912 P.2d 129 (1996).

JURISDICTION

The judgment of the Supreme Court of Kansas was entered on March 1, 1996.

The petition for a writ of certiorari was filed on April 12, 1996. The conditional cross petition for a writ of certiorari was filed on May 13, 1996. Both were granted on June 17, 1996. The jurisdiction of the Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *ex post facto clause* of the United States Constitution states, "No state shall . . . pass any . . . *ex post facto law*." U.S. Const. Art. 1, Sec. 10.

The double jeopardy clause of the United States Constitution states, ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;" U.S. Const. Amend. V.

The Kansas Sexually Violent Predator Act is set forth in its entirety in Pet. App.

Other Kansas statutes cited are set forth in the Appendix to this Brief.

STATEMENT OF THE CASE

Introduction

Leroy Hendricks was the first person committed to an indefinite term of secure confinement under a statute enacted by the Kansas legislature in 1994. The Sexually Violent Predator Act ("SVP Act"), like the Washington statute after which it was modeled, was a sharp departure from previous sex offenders commitment statutes designed to provide a disposition alternative to a traditional criminal prosecution and sentencing. The SVP Act was aimed

at preventing the release into the community of dangerous sex offenders who had completely served sentences of imprisonment.

Mr. Hendricks was about to be released after serving the sentence recommended by the State as part of a plea agreement and imposed by the court following his convictions for taking indecent liberties with children in 1984, when the District Attorney responsible for criminal prosecutions in Sedgwick County, Kansas—the same office that prosecuted Mr. Hendricks and negotiated his plea agreement—filed a petition seeking commitment under the SVP Act. Mr. Hendricks is not mentally ill, and he does not suffer from a personality disorder as that term is used by mental health professionals. As a result of a jury trial finding him a "sexually violent predator," Mr. Hendricks has been confined at the Larned Correctional Mental Health Facility, a facility operated by the State Department of Corrections. The director of the State's sex offender treatment program admitted, however, at a hearing held several months after Mr. Hendricks' commitment, that he and the others committed under the SVP Act were receiving "essentially no treatment." J.A. 393. On review of Mr. Hendricks' commitment, the Kansas Supreme Court concluded that "[i]t is clear that the primary objective of the Act is to continue incarceration and not to provide treatment." Pet. App. 17a.

This case is before the Court on the State's petition challenging the Kansas Supreme Court's ruling that the SVP Act violates the due process clause of the Fourteenth Amendment and Mr. Hendricks' cross-petition challenging his commitment on the additional grounds presented to but not reached by the Kansas Supreme Court that his confinement is punishment in violation of the ex post facto and double jeopardy clauses.[1]

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[1] Mr. Hendricks' cross-petition also sought review of his equal protection challenge to the statute. This claim will be subsumed in his substantive due process argument, and will not be separately briefed.

The 1984 Plea Agreement

In 1984, Leroy Hendricks was charged with three counts of taking indecent liberties with a child for fondling three thirteen year old boys who came into the electronics shop where he worked. Each charge carried a maximum penalty of 5 to 20 years imprisonment. Pet. App. 3a, K.S.A. 21-3503. The court was authorized to impose consecutive sentences for each count and could have tripled each sentence under the habitual criminal act because of Mr. Hendricks' prior convictions. The maximum allowable sentence for the offenses charged was therefore a total of 45 to 180 years. K.S.A. 21-4504. Had he received the maximum sentence, Mr. Hendricks would have first been eligible for parole in 2007, at age 73, and would have been entitled to mandatory release with good time in 2074. K.S.A. 22-3717(a), (c)(1); 22-2718.

For reasons that do not appear of record, the State elected not to request consecutive sentences or enhancement under the habitual offender provision. Instead, the State reached a plea agreement with Mr. Hendricks, under which it dismissed one count, did not request habitual offender sentencing, and recommended a sentence of 5 to 20 years on the remaining counts, asking the court to impose concurrent sentences. Mr. Hendricks entered a guilty plea on the basis of that agreement, and the court imposed the agreed upon sentence. Pet. App. 16a-17a. Mr. Hendricks was therefore eligible for parole after three years, and entitled to mandatory release if he earned all possible good time credits, after serving ten years. K.S.A. 22-3717(a)(c)(1); K.S.A. 22-3718.

The State also chose to forego the option of referring Mr. Hendricks to a psychiatric facility for evaluation and treatment, if appropriate. Had an evaluation found him in need of treatment, Mr. Hendricks could have been placed in a secure psychiatric facility until treatment was no longer helpful, at which time he would have been returned to court for sentencing. Time spent in the hospital

under this provision would have counted towards any sentence imposed. The length of hospitalization could not have exceeded the maximum possible sentence. K.S.A. 22-3429-3431.

Mr. Hendricks served his sentence without incident. He earned all possible good time and was scheduled for release at the expiration of his sentence, on September 11, 1994. J.A. 5. Mr. Hendricks would have been sixteen days shy of his 60th birthday. While on release, he would have been under parole supervision requiring him to live in a halfway house and participate in group and individual treatment. J.A. 183, 186; Certificate of Conditional Release (Lodged Document).

The Kansas Sexually Violent Predator Act

In July 1993, a young woman named Stephanie Schmidt was raped and murdered by a co-worker who had recently been paroled from a sentence of rape. Her death inspired an *ad hoc* task force that lobbied for legislation intended to prevent similar crimes from happening in the future. The task force included legislators, law enforcement personnel, members of the parole board, probation officers, and concerned citizens. It did not include any mental health professionals. Pet. App. 25a-26a.

The Schmidt Task Force proposed the SVP Act to the 1994 legislature. The same legislature passed proposals that increased the sentences for some violent crimes and permitted an upward departure from the state sentencing guidelines for a defendant found to be a "predatory sex offender". That term is defined as one who "suffers from a mental condition or personality disorder which makes the offender likely to engage in additional acts" constituting serious sexual crimes, following conviction for a crime of extreme sexual violence. K.S.A. 21-4716. That definition is nearly identical to that of a "sexually violent predator".

Unlike these stiffer penalties, the SVP Act specifically targeted sex offenders already convicted and in custody

who were thought to be too dangerous to be released at the end of their terms. The SVP Act proposed to allow the continued custody of those persons, after the expiration of their sentences, by imposing a "civil" commitment upon them. Pet. App. 26a, 27a.

The history of the SVP Act in the Kansas legislature offers insight into the Act's purpose. The proponents of the legislation had the benefit of the Washington Supreme Court's opinion upholding its virtually identical statute and discussing a number of constitutional challenges. The principal sponsor, Senator Bob Vancrum, therefore stressed that, "like the statute upheld by the Washington Supreme Court, the bill does not serve any punitive goal. It is civil in nature and thus does not offend the double jeopardy clause, which applies to criminal matters." J.A. 462. However, other testimony from supporters of the legislation demonstrates that their objective was incapacitative confinement, not treatment. For example, then State Attorney General Robert Stephan testified:

> From the therapeutic perch as legislators, you have an opportunity to pass what might be *the most significant preventive criminal justice legislation* to be presented in this 1994 session of the Kansas Legislature. Most new laws against criminal conduct tend to provide punishment after the victimization has occurred. *Senate Bill 525 will act prospectively and be preventative of criminal conduct and not just punitive.* You have a rare opportunity to pass *a law that will keep dangerous sex offenders confined past their scheduled prison sentence.* As I am convinced *none of them should ever be released,* I believe, as legislators, have an obligation to *enact laws that will protect our citizens through incapacitation of dangerous offenders.*
>
> Under the provisions of the sentencing and parole system in effect prior to July 1, 1993, a violent sex offender could serve the full sentence and be released without any relevant safeguards for the public. In the same manner under the sentencing guidelines, a

violent, sex offender will be released at the end of the sentence imposed. *With either system, there has been no adequate legal provision to continue incarceration of violent sexual predators past the period of mandatory incarceration.* J.A. 468-69. (Emphasis added)

Special Assistant Attorney General, now Attorney General Carla Stovall, urged enactment of the bill on the basis of her experience as a member of the Kansas Board of Parole:

> Because of the nature of sexually violent crimes and the psychological makeup of those who are prone to commit them, we must take extraordinary precautions to protect society from them. *We cannot open our prison doors and let these animals back into our communities.* If we do—we are accomplices to the atrocities which they will surely commit.
>
> Let me share with you for a moment the utter frustration I experienced as a member of the Kansas Parole Board. I would routinely see sex offenders and pass them as long as possible. . . But when the inmates reached their conditional release date . . . they had to be set free.
>
> The file would come to the board only for the purpose of setting conditions for their release. . . As I would write out those conditions, a knot would always grow in my stomach. I knew the rapists or child molesters were being turned loose on an unsuspecting public to reoffend. . . And there was nothing I could do to prevent it. J.A. 475-76 (Emphasis added).

Neither General Stephan nor General Stovall so much as paid lip service to the goal of treating those committed as sexually violent predators. Rather, as General Stovall put it in her concluding remarks, "[i]t would allow us to keep the sexually violent offenders locked up indefinitely." J.A. 478.

Mental health professionals confirmed that the result of commitment would be prolonged confinement, rather

than treatment leading to release. For example, Tom Locke, on behalf of the Kansas Psychological Association, warned that, "I believe the probability that a professional would take the position that an individual once found to be a SVP is no longer dangerous is very low. Our ability to change an individual's sexual preference for children or eliminate the urge to express sexual and violent impulses together is limited. Lengthy periods of commitment with little likelihood of release are almost inevitable. Perhaps that is the goal of the statute." J.A. 483. James Karlan, director of the Southwest Guidance Center, a sex offender treatment program, echoed this concern:

> Recognizing the potential for a lawsuit should such an offender be released from a mental health inpatient facility and then perpetuate a sexual crime on another victim, no psychiatrist working in a state inpatient hospital will certify that someone in his or her care has essentially been "cured" of being a sexually violent predator as defined in Section 2 and recommend the offender's release into the community. As a result, state inpatient mental health facilities will begin to warehouse offenders . . . *state psychiatric hospitals will essentially be turned into prisons,* . . . J.A. 509 (Emphasis added)

Similarly, in writen testimony on behalf of the Secretary of the Department of Social and Rehabilitation Services (SRS), the agency responsible for providing treatment under the Act, George Vega, the Commissioner of Mental Health and Retardation Services told the Kansas House Judiciary Committee that, "[i]f the process requires professionals to state a sexual predator is cured or not likely to repeat acts of violence before a person is discharged, the professionals will not make such statements which might place their reputations and licenses on the line. This means the patients may never be released." J.A. 567. A member of the Schmidt Task Force reported that the group had studied sex offender treatment, and were aware of doubts about its effectiveness. Although they concluded that because there was no effective treatment

the commitment would amount to a life sentence, the response was: "SO BE IT." J.A. 503 (Emphasis in original).

In addition to learning of doubts in the mental health professions about the efficacy of treatment and the likelihood of release, the Kansas House and Senate committees considering the SVP Act heard specific concerns about the availability of treatment in Kansas. Dr. Locke opined that, "adequate facilities to address this pattern of deviant behavior does not exist within the Department of Social and Rehabilitation Services." J.A. 483, 484. Dr. Mani Lee, Superintendent of the Larned State Hospital voiced similar reservations. Dr. Lee noted that the Hospital had no one currently on staff with expertise in treating sexually violent predators and that the training for new staff was not available in Kansas. He also expressed concerns about whether funding would be available to pay for needed equipment. J.A. 552. The written testimony submitted on behalf of SRS confirmed these fears. J.A. 569. Reservations about treatment had no effect, however, on the legislature's willingness to enact a bill that promised to remove dangerous sex offenders from the community.

The lobbying efforts of the task force were rewarded with the passage of the Sexually Violent Predator Act. Pet. App. 60a-68a, K.S.A. 59-29a01 *et seq*. The Act was patterned after a Washington State statute that was passed in 1990. J.A. 460, 461. Unlike prior sex offender commitment statutes adopted by other states, the Kansas statute, like Washington's legislation, was designed not as an alternative to criminal sentencing but as a way to prolong confinement of persons who have been prosecuted and sentenced. The Act provides for a "civil commitment" of persons who according to the legislative "findings" comprise a "small but extremely dangerous group" of "predators" who do not have a mental defect or disease that renders them appropriate for involuntary treatment under the existing involuntary treatment statutes. The SVP Act applies only to persons prosecuted for sex offenses who are convicted and sentenced, found not guilty by reason of insanity after proof that the person committed the offense, or found incompetent to stand trial and later proved to have committed the charged offense beyond a reasonable doubt in a special hearing. K.S.A. 59-29a03. Members of this group are found to have "antisocial personality features" which are unamenable to existing mental health treatment modalities and are likely to engage in future acts of sexual violence. The legislature also determined that the prognosis for rehabilitating such persons was "poor" and the treatment needs are "very long term". Pet. App. 60a, K.S.A. 59-29a01.

The Act defines "sexually violent predator" as:

> "any person who has been convicted of or charged with a sexually violent offense and who suffers from mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." Pet. App. 60a, K.S.A. 59-29a 02(a).

The Act defines "mental abnormality" as:

> "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menance to the health and safety of others." Pet. App. 60a, K.S.A. 59-29a 02(b).

"Predatory" is defined as:

> "acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization." K.S.A. 59-29a01(c).

"Sexually violent offense" is defined to include nine specific offenses, as well as attempts, conspiracies and solicitations to commit those offenses. It also includes any offense which is determined at sentencing or during the

commitment proceeding to have been sexually motivated. K.S.A. 59-29a01(e).

The Act provides procedural safeguards paralleling those in a criminal case. K.S.A. 59-29a06. The commitment procedures only apply to those who are about to be released from total confinement. K.S.A. 59-29a03. The petition to have a person declared a sexually violent predator is filed shortly before release. K.S.A. 59-29a04. After the filing, a probable cause finding is required. The matter then proceeds to a trial where either party or the judge may request a jury trial. K.S.A. 59-29a05, 29a06. If the person is found to be a sexually violent predator, the court must order commitment to the custody of the Secretary of Social and Rehabilitation Services. SRS, in turn, is empowered to enter into an agreement with the State Department of Corrections to provide a facility. The person is segregated from mentally ill persons. Unlike those civilly committed for mental illness, there are no specific guarantees of rights and privileges accorded the committees.[2]

Once committed, the person's mental condition is examined each year and a report is sent to the court. The court then conducts a review without the committee's presence to determine if there is probable cause to believe that the person's mental abnormality or personality disorder is so changed that the person is safe to be at large will not engage in acts of sexual violence if discharged. If probable cause is found, the court orders a hearing at

[2] The Act for Care and Treatment of Mentally Ill Persons specifically restricts the use of mediation without consent, K.S.A. 59-2927a; restrictions use of restraints, K.S.A. 59-2928; allows use of the patient's own clothes, personal possessions and money, allows confidential telephones, allows for conjugal visits if facilities are available, allows reception of visitors daily, permits the refusal of involuntary labor and requires payment for work performed, prohibits use of various treatment procedures, requires an explanation of all medications, provides for confidential mail and visitations with those agencies or persons directly involved with the commitment. K.S.A. 59-2929.

which the person committed is entitled to be present. If the court does not find probable cause, there is no hearing, at any time, at which the committed person is entitled to be present. At a hearing the same procedures used in the initial commitment are utilized. K.S.A. 59-29a08.

The Secretary of SRS may authorize a committee to petition for release upon a determination that the persons' mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released. Upon receipt of an authorized petition, the court sets a hearing. That hearing also utilizes the procedures used in the initial commitment. K.S.A. 59-29a10. The committee also may petition the court for release without authorization from the secretary. In such cases, the court shall endeavor whenever possible to review the petition and determine if the petition is based upon frivolous grounds and if so shall deny the petition without hearing.[3]

The Commitment Proceedings

On August 17, 1994, the State filed a petition alleging the Respondent was a sexually violent predator. J.A. 4. Two days later, a hearing was held to determine if there was probable cause to believe the allegation was true.[4]

[3] In civil commitments of mentally ill persons, a patient is entitled to request a hearing each 90 days during the first six months of treatment and every 180 days thereafter. Upon receipt of a request, the matter is set for hearing. 59-2919, The mental illness commitments also allow for conditional release and total release at the direction of the head of the treatment facility. K.S.A. 59-2924.

[4] The State presented evidence from Dan Crask, a licensed specialist clinical social worker. Based on reports compiled in 1985, he opined that Respondent had pedophilia and that people with pedophilia may stop their behavior occasionally after incarceration, but tend to repeat that behavior over time. J.A. 24-26. He further testified that pedophilia is not a personality disorder. He could not give the court a definition of "mental abnormality". J.A. 28. Based upon that testimony, the court found probable cause and ordered a further evaluation of the Respondent. J.A. 34.

Respondent moved for dismissal of the petition on the grounds that the procedure violated constitutional provisions including the *ex post facto*, double jeopardy, substantive due proces and equal protection. J.A. 32-35. The Court deferred ruling on the motion. J.A. 36-43.

In a pretrial hearing on Respondent's motions to dismiss, Terry E. Davis, an SRS official in charge of implementing the program for the treatment of persons committed under the Act, acknowledged that persons committed under the Act would be housed in a Department of Corrections (DOC) facility. In addition to perimeter security, DOC would also provide security inside the building central control area. Persons committed under the Act would share outdoor recreation areas, weight rooms, libraries and gyms with DOC convicts. The SVP ward would have the same type of rooms, the same type of shower facilities, the same food service, the same laundry service and the same medical facilities as provided to DOC inmates. J.A. 77-81. Mr. Davis stated he was not aware of any programs dealing with sexual offenders that are successful in modifying behavioral outcomes on an involuntary commitment basis. J.A. 91.

At the same hearing, William Cummings, a Department of Corrections official, testified that the Larned Correctional Mental Health Facility is a maximum security facility. He further testified that treatment programs for sex offenders convicted of sexually violent crimes are available at minimum security facilities. J.A. 106-108.

Following further hearing and briefing, the trial court found the commitment procedure to be civil in nature. J.A. 89-94. The evaluation proceeded and the matter came to trial on October 3, 1994.

At the commitment trial, the State began its case by calling Respondent to testify.[5] Mr. Hendricks outlined

[5] As consequence of its ruling that the commitment proceeding was civil, the district court concluded that Mr. Hendricks had no privilege against self incrimination. J.A. 42.

his family background, J.A. 126-130, as well as his previous sexual offenses against children.[6] J.A. 130-172. He stated that during his latest incarceration he had received no treatment for any sexual disorder.[7] J.A. 179-180. He stated that he had not had any urge to have sexual contact with children since 1985, and he was aware that if he re-offended, he would spend the rest of his life in prison. J.A. 187. He acknowledged however, that he was a "pedophile" and while he hoped that he would not re-offend, the only way he could "guarantee" that he never would was to die. J.A. 190.

Dr. Charles Befort, the chief psychologist at Larned State Hospital, testifying for the State, maintained that Mr. Hendricks was neither mentally ill nor suffering from a personality disorder. J.A. 256-257. He also stated that the term "mental abnormality" was not a diagnostic term. He acknowledged that the term "mental abnormality" was circular, in that the behavior was used both to identify the condition and to predict future behavior. J.A. 263-264. Dr. Befort labeled Mr. Hendricks as a pedophile and stated that, in his interpretation of the statute, pedophilia was a "mental abnormality". He also acknowledged that his interpretation was open to debate. J.A. 271-272. He further opined that Respondent would engage either in acts of sexual violence or sex acts with children if permitted to do so, based in large part on his belief that behavior is a good predictor of behavior. J.A. 247-248. He interpreted the term "likely" in the SVP

[6] Although Mr. Hendricks did not deny committing sexual offenses, including fondling of genitals and oral sex with both boys and girls, against children, including his stepdaughter and stepson, the State also called witnesses to testify to specific instances of sexual abuse. J.A. 192, 196, 206.

[7] Mr. Hendricks testified that he had been offered treatment in prison but had not enrolled in it. He said his reasons included the desire to work, which would not have been possible in treatment, and that he had been told that there was no cure for his type. J.A. 143, 235. He also told Dr. Befort that he believed the treatment was not effective. J.A. 235.

Act to mean more probable than not. J.A. 260-61, 279. Dr. Befort never hazarded a guess about when in the future Respondent's sexual conduct might occur.

Following instructions and closing arguments, the jury found the Respondent to be a sexually violent predator. J.A. 358. Respondent filed a motion to dismiss, or in the alternative for a new trial, which was heard on October 20, 1994. At that hearing, the Respondent presented evidence that SRS had not entered into any contacts with a provider to furnish sexual predator treatment. No new treatment staff had been hired to provide treatment for committees under the SVP Act. J.A. 366-372. The motion was overruled.

Following the finding that he was a sexual predator. Respondent was committed to Larned State Security Hospital. In February, 1995, he was moved to the Larned Correctional Mental Health Facility, which is maintained by the State Department of Corrections. Dr. Befort, now acting Clinical Director of the Sexual Predator Treatment Program, testified in a subsequent state *habeas corpus* hearing that persons committed under the Act were receiving "essentially no treatment" J.A. 393. Indeed, Dr. Befort acknowledged that he did not feel fully qualified to head the sexual predator treatment program. J.A. 394. Dr. Befort stated that the primary contact he had with Respondent and others committed under the Act was in a group session that he attempted when his schedule permitted. He said the focus of the sessions was the lack of treatment and that there was little if any discussion of the sexual deviancy issues which had led to the commitments. J.A. 399. Dr. Befort concluded that the Respondent and the other persons committed under the Act had received virtually no treatment. J.A. 400. The court ruled that while the petition for relief had alleged no treatment was being provided, there was "ward milieu" therapy being given and therefore denied release even though Dr. Befort testified that "ward milieu" therapy would never result in a committee's release. J.A. 417.

Decision of the Kansas Supreme Court

Respondent appealed the commitment. He argued that the Act, though labeled "civil", was punitive in purpose and effect and therefore violated the prohibition against double jeopardy and *ex post facto* laws. He also argued that he had been denied equal protection of the law because those committed under the SVP Act were subject to more onerous conditions and greater difficulty of release than persons committed under the State civil commitment laws. Respondent further asserted that the Act, by requiring indefinite incarceration of persons without a finding of both dangerousness and mental illness, violated substantive due process. Pet. App. 10a. The Kansas Supreme Court agreed that the Act violated substantive due process without reaching the *ex post facto* and double jeopardy issues.

In making that decision, the Kansas Supreme Court explained:

> We must determine if Hendricks is denied substantive due process based not on his lack of character but, rather, on the merits of his challenge. Mental illness is defined by K.S.A. 59-2902(h) as meaning any person who (1) [is] suffering from a severe mental disorder to the extent that such person is in need of treatment; (2) lacks capacity to make an informed decision concerning treatment; and (3) is likely to cause harm to self or others. Here, neither the language of the Act nor the State's evidence supports a finding that 'mental abnormality or personality disorder' as used in 59-29a02(a), is a 'mental illness' as defined in 59-2902(h). Absent such a finding, the Act does not satisfy the constitutional standard set out in *Addington* and *Foucha*. Justice White, speaking for the majority of the United States Supreme Court in *Foucha*, clearly stated that to indefinitely confine as dangerous one who has a personality disorder or antisocial personality but is not mentally ill is constitutionally impermissible. 504 U.S. at 78.

Similarly, to indefinitely confine as dangerous one who has a mental abnormality is constitutionally impermissible.

In addition, the State's own evidence is that Hendricks was being committed even though he does not suffer from mental illness. Hendricks is not mentally ill, and the criminal offenses for which he was imprisoned were not the result of mental illness. Therefore, as applied to Hendricks, the constitutionality of the Act depends upon a showing of dangerousness without a finding of mental illness. Clearly, the due process standard of Addington and Foucha is not met by the Act as applied to Hendricks. We conclude that the Act violates Hendricks' substantive due process rights. Pet. App. 20a.

While the Kansas Supreme Court did not directly address the issues of double jeopardy, *ex post facto*, and equal protection, it did make findings which are relevant to them. The majority concluded:

It is clear the overriding concern of the legislature is to continue segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. The legislature concedes that sexually violent predators are not amenable to treatment under K.S.A. 59-2901 et seq. If there is nothing to treat under 59-2901, then there is not mental illness. Pet. App. 16a.

The Court concluded,

It is clear that the primary objective of the Act is to continue incarceration and not provide treatment". Protecting the public is a legitimate exercise of the State's police power. Although the Act is a well-intentioned attempt by the legislature to accomplish that objective, it canont be done in a constitutionally impermissible manner. Having said that, we need to point out that the legislature has pro-

vided the State with other options to achieve that objective and, in addition, has the authority to increase the penalty for sex crimes committed against children." Pet. App. 17a. Justice Larson, joined by Justices McFarland and Six, dissented.

SUMMARY OF ARGUMENT

In 1994, Kansas adopted a statute that applies a severe regime of extended incarceration against individuals already convicted of and punished for criminal offenses. Responding to a public outcry which contended that already-convicted sex offenders posed a danger if released, the State passed a bill requiring potentially life-long incarceration for such individuals found to be "sexually violent predators." The statute applies to individuals who have been held criminally responsible for their conduct and can be imposed upon a person, like Respondent, who the State's own expert asserts is not mentally ill.

This Court has never before confronted such a statute. Unlike the sexually dangerous persons provision considered in *Allen v. Illinois*, 478 U.S. 364 (1986), this statute does not attempt to divert individuals from the criminal process, "disavow punishment," and impose, in lieu of punishment, a commitment to treatment. Rather, the SVP Act only comes into operation *after* the individual has been criminally convicted and punished. Indeed, the commitment for "treatment" in this statute may occur years after the acts giving rise to the need for commitment have occurred. Nor is this procedure intended as a separate indeterminate criminal sentencing statute (*see Specht v. Patterson*, 386 U.S. 605 (1967)), since Respondent's sentence occurred more than a decade ago.

Rather, the purpose and effect of this statute is to prolong the incarceration of individuals whose criminal conduct occurred long before the enactment of the statute. Because that "purpose and effect" is unquestionably punitive, the penalty imposed upon Respondent violates the Constitution's prohibition against *ex post facto* laws.

Moreover, because Respondent is being prosecuted and punished again for criminal offenses adjudicated in 1984, the proceedings violate the Constitution's protections against double jeopardy.

1. Although it would be hard for a layperson or lawyer to contend that labeling a convicted criminal a "predator" and imposing upon him a consecutive indeterminate sentence in maximum security confinement could be anything but punishment, the State argued below that the statute was a legitimate exercise of the State's civil *parens patriae* power, designed to promote "treatment" of sexual predators. However, the conclusion of the Kansas Supreme Court, which is entitled to deference (*see Romer v. Evans*, 116 S.Ct. 1620 (1996); *Reitman v. Mulkey*, 387 U.S. 369 (1967)), is that the purpose of the statute "is to continue incarceration and not to provide treatment." Pet. App. 17a. That conclusion is fully justified by the language of the statute, the history surrounding its enactment, and the implementation of the commitment regime.

The statute is punitive in that it targets only incarcerated individuals ready for release. Whatever treatment interest the state allegedly possesses is confined to these convicts and is also deferred for decades until the convict has served every day of confinement prescribed for the crime. The language of the statute itself demonstrates that incarceration is the goal. In its preamble, it acknowledges that long-term confinement of sexual predators is required and that such people are not amenable to current treatment. In contrast to the dangerous sexual offender statute approved in *Allen*, the Act requires incarceration in a secure facility, and does not permit treatment in a range of facilities appropriate to the individual. That long-term incarceration was the goal of the statute was also evident in the legislative history. The Attorney General urged that Sexual Predators "should [n]ever be released." The task force that proposed the legislation acknowledged that no existing treatment was effective, urged

that the statute would, in effect, create a life sentence, and urged support for the legislation on that basis. Mental health professionals confirmed this reading by assuring the legislature that "no psychiatrist" would ever certify that a mentally responsible sexually violent predator would be suitable for release.

The legislature was repeatedly informed by governmental officials that the Department of Social and Rehabilitation Services had no resources to develop a treatment program. However, since incarceration, rather than treatment, was the goal of the statute, it is no surprise that the legislature made no effort to provide funds or resources to develop a treatment program. Today, Respondent is being visited by a program director who has asserted he is not fully competent to provide treatment and who has acknowledged that Respondent is receiving "essentially no treatment," a finding echoed by the Kansas Supreme Court. Instead of receiving treatment in a therapeutic setting, respondent is incarcerated in a Department of Corrections facility, in a setting indistinguishable from his former convict status, and denied the privileges routinely given to civilly committed inmates in Kansas.

Since the Kansas Supreme Court was correct in its determination that this is not a commitment for treatment, this case is utterly unlike *Allen v. Illinois, supra*, where this Court upheld the Supreme Court of Illinois's characterization of its Sexually Dangerous Persons Act as "essentially civil in nature." 478 U.S. at 367. In *Allen*, this Court properly deferred to the Illinois Supreme Court's characterization that the statute provided for civil proceedings *in lieu of a criminal prosecution*, because the state disavowed any interest in punishment, because it provided for release "after the briefest time in confinement," *id.*, at 370, and because the defendant had failed to show that the confinement imposed a regimen similar to that of convicts. In all relevant respects, the Sexually Violent Predator Act differs from its very distant Illinois

cousin. In Kansas, the State has embraced punishment, not disavowed it, and required service of a criminal sentence before release, and, indeed, has only targeted those already incarcerated for the commitment. Unlike Illinois, the Kansas Supreme Court was aware that under its statute, release would not occur after the "briefest time in confinement" but would rarely if ever occur. Unlike Illinois, in Kansas, the State has disavowed treatment and imposes a regimen equivalent to that imposed on convicts in a facility administered by the Department of Corrections.

2. Once the pretense of treatment is stripped from the statute, there can be no doubt its "purpose and effect" is punitive. The statute imposes involuntary incarceration of a person upon proof that he or she committed a criminal act, the very paradigm of punishment. That one of the reasons for this incarceration is incapacitation of the offender does not render the statute non-punitive. Incapacitation for the protection of society has always been recognized as a core function of the criminal law (*see United States v. Brown*, 381 U.S. 437, 458 (1985); *Foucha v. Louisiana*, 504 U.S. 99 (Kennedy, J., dissenting)), and this court has explicitly found in *Specht v. Patterson*, 386 U.S. 605, 608, 609 (1967), that incapacitation as a sexual psychopath may be criminal punishment even though designed more as incapacitation than retribution.

In addition to the fact of imprisonment, the very language of the Act is punitive. The finding that the individual is a "predator" is, if anything, more stigmatizing than a designation of the individual as criminal, and the subjects of this act were referred to as "animals" during the legislative debate. While such designations may be appropriate for those the state seeks to condemn, they are highly inappropriate for those supposedly the subjects of a therapeutic, non-punitive commitment.

Finally, the criminal nature of this statute is evidenced by its procedural mechanisms. Like a criminal trial, it

is commenced by the district attorney and it requires proof beyond a reasonable doubt that the individual has committed a criminal offense.

3. Because the Sexually Violent Predator Law is, in essence, a punitive statute, its application to Respondent violates the constitutional prohibition against *ex post facto* laws. The Constitution "forbids the application of any new punitive measure to a crime already consummated." *California Dept. of Corrections v. Morales*, 115 S.Ct. 1597, 1601 (1995). The SVP Act obviously constitutes a new punitive measure, in effect imposing a consecutive life sentence upon Respondent. It is also clearly retrospective, since the most recent criminal conduct alleged in the proceeding was Respondent's 1984 conviction, which occurred a decade before enactment of the SVP law.

4. Finally, the SVP proceeding constitutes both a second prosecution and a second punishment, prohibited by double jeopardy. This Court has held on numerous occasions that the Double Jeopardy Clause protects an individual against being prosecuted a second time after conviction for the same offense. In every sense, the SVP proceeding was a second prosecution for Respondent's offense of indecent liberties.

In addition, the SVP proceeding constitutes a second punishment prohibited by the Double Jeopardy Clause. This Court has consistently interpreted double jeopardy as prohibiting the imposition of multiple punishments in separate proceedings. As this Court has noted, "when the Government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with sanction obtained in the first proceeding." *United States v. Halper*, 490 U.S. 435, 451 n.10 (1989). The SVP proceeding against Mr. Hendricks is a thinly-veiled attempt to seek an addi-

tional term of incarceration against a defendant it believes it may have treated too leniently more than a decade ago. Its attempt at imposing a consecutive lifetime incarceration clearly violates doube jeopardy.

ARGUMENT

I. COMMITMENT OF A "SEXUALLY VIOLENT PREDATOR" ON THE BASIS OF CRIMINAL CONDUCT AND FOR THE PURPOSE OF INCAPACITATION, IS PUNISHMENT

When the 1994 Kansas Legislature passed the Sexually Violent Predator Act, it stated it was establishing "a civil commitment procedure for the long term care of the sexually violent predator." Pet. App. 60a KSA 59-29a01. But "[t]he Constitution deals with substance not shadows. The inhibition was labeled at the thing, not the name." *Cummings v. Missouri*, 71 U.S. (4 Wall) 277, 325 (1867). The label attached to a penalty by the legislature is not controlling. "[T]he Constitution constrains the State's ability to denominate proceedings as civil and so dispense with the criminal procedure protections provided by the Bill of Rights." *Montana Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1953 (1944) (O'Connor, J., dissenting)

This Court has consistently used a two step approach to determine whether legislation is subject to constitutional restrictions applicable in criminal proceedings, most recently in *United States v. Usery*, Slip Op., June 24, 1996 at 20. First, the Court determines whether the legislature intended the proceedings to be criminal or civil. *Id.* Since the legislators who proposed this statute were fully aware that they could not accomplish their objective of keeping sex offenders locked up after expiration of their sentences through the criminal law, it is no surprise that they attempted to affix a civil label to the proceeding. However, a legislature's description of a statute as civil

does not foreclose the possibility that it has a punitive character. *Kurth Ranch*, 114 S. Ct. at 1945.[8]

The second step is to consider whether the commitment proceedings are so punitive either in purpose or effect that they may not legitimately be viewed as civil in nature, despite the legislature's intent. *United States v. Ursery*, Slip Op. 20, 22 n.3 (quoting *United States v. Assortment of 89 Firearms*, 465 U.S. 354, 365, 366 (1984)). In making the determination of whether a nominally civil statute is penal or regulatory in character, the Court has frequently invoked the test set out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168, 169 (1963):

> Whether the statute involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Respondent submits that the Kennedy factors can be distilled into three inquiries. The first two relate to the

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[8] The Court has consistently refused to put off by civil labels when the purpose or effect of legislation is punitive. *Cummings v. Missouri, supra* (disqualification from office or from the pursuits of a lawful avocation, is a punishment); *In re Garland*, 4 Wall 333 (1867) (disbarment from practicing law in federal courts); *Lipke v. Lederer*, 259 U.S. 557, 51 S. Ct. 549 (1922) (tax on dealer for violating liquor control laws); *United States v. La France*, 282 U.S. 568, 51 S.Ct. 278 (1931) (double tax on illegal sale of liquor); *United States v. Constantine*, 296 U.S. 287 (1935) (excise tax on conducting a retail liquor business; *United States v. Lovett*, 328 U.S. 303 (1946) (ban from government employment, stigmatization of reputation and serious impairment of ability to earn living); *United States v. Halper*, 490 U.S. 435 (1989) (excessive civil penalties); *Kurth Ranch, supra* (tax on possession of marijuana). None of these sanctions even approaches the involuntary indefinite confinement provided for by the SVP Act.

idea that punishment is the imposition of a sanction to express society's condemnation of forbidden conduct and moral blameworthiness of the actor. They are: 1) is the sanction historically a form of punishment; 2) is the imposition of the sanction triggered by finding the commission of a criminal offense. The third factor is whether the sanction is adequately explained by a regulatory or remedial purpose, rather than punishment.

Whether a sanction is historically considered punishment is important objective evidence that a person subjected to the sanction will view himself, and be viewed by society, as blameworthy and criminal. Moreover, history helps to define the types of sanctions to which the Framers intended the Bill of Rights and the *ex post facto* clause to apply. A link between the imposition of the sanction and proof that a person's conduct meets the definition of a crime is also strong objective evidence that the sanction is imposed for blameworthy, criminal acts. Finally, the inquiry into proportionality asks whether the alternative civil purpose sufficiently justifies the severity of the sanction imposed to explain away the objective evidence that the sanction is punishment.

In this simplified form, Respondent believes the *Kennedy* test to a large extent explains this Court's many decisions distinguishing punishments from civil remedies. As the *Kennedy* Court acknowledged, in some cases "this problem has been extremely difficult and elusive of solution." 372 U.S. at 168. Here, however, as in *Kennedy*, Respondent believes "[t]he punitive nature of the sanction is evident." *Id.* The striking objective parallels between criminal prosecution and sentencing and commitment under the SVP Act certainly answer the first two questions of the simplified *Kennedy* test affirmatively, as will be demonstrated in detail later in the brief. To begin with Respondent will show that "civil" commitments under the Act cannot be justified by civil interest in treatment.

A. The Primary Objective of the SVP Act is to Incapacitate, Not to Provide Treatment

The Kansas Supreme Court found it "clear that the primary objective of the Act is to continue incarceration and not provide treatment." Pet. App. 17a. The State Supreme Court's understanding of the purpose of state law should be "authoritative" here, just as it was in *Romer v. Evans*, 116 S.Ct. 1620, 1624 (1996). The text of the Act, its legislative history and the history of its implementation offer the "clearest proof" that the civil remedial objective of treatment for mental illness on which this Court relied in *Allen v. Illinois*, 478 U.S. 364 (1986), was, as the Kansas Supreme Court recognized, "incidental, at best" Pet. App. 16a to a statutory scheme intended to confine repeat sex offenders. The Kansas Supreme Court agreed that incapacitation of dangerous offenders was a "legitimate exercise of the State's police power," Pet. App. 17a which Kansas could certainly achieve by adopting a repeat sex offender sentencing provision. What Kansas cannot do, by attaching a "civil label of convenience," *In re Gault*, 387 U.S. at 114, is to extend its police powers beyond the bounds of the Constitution to reach those who have already been punished for their crimes and who committed their offenses before the enactment of the SVP Act. A State cannot defeat the *ex post facto* and double jeopardy prohibitions by cloaking an incapacitative purpose behind the State's *parens patriae* power to provide treatment.

1. *Text*

Several features of the SVP Act demonstrates that commitment under the Act bears no resemblance to past sexual offender commitment schemes or to ordinary civil commitment of mentally ill. In contrast to sexual offender statutes this Court has previously considered, the SVP Act is not an alternative to criminal prosecution or to a tradi-

tional criminal sentence.[9] The Act applies *only* to persons who have already been prosecuted for sex offenses and confined as a result of those prosecutions. K.S.A. 59-29a02 (SVP limited to "any person convicted or charged with a sexually violent offense"); 59-29a03(a) (commitment procedures triggered by anticipated release of convicted offenders, (a)(1), or persons confined as a result of a finding of not guilty by reason of insanity, (a)(2), or incompetency (a)(3)).

Commitment is cumulative to other punishment, not an option for treatable offenders. Moreover, the Act requires the State to defer the "treatment" that is allegedly the purpose of the statute for up to decades after the appearance of the "mental abnormality" that caused the offenses. If in fact that criminal conduct is caused by a mental abnormality that can be treated, and if treatment is indeed the goal of the Act, it would be absurd for the State deliberately to delay the treatment until the punishment had been fully served.[10]

The SVP Act is also not targeted at persons suffering from treatable mental illness. *Compare Allen*, 478 U.S.

[9] The commitment scheme in *Allen v. Illinois*, for example, was triggered by an arrest and prosecution, but the State was required to elect prosecution or commitment. 478 U.S. at 370. In *Specht v. Patterson*, the sexual phychopath statute provided an alternate form of disposition for a convicted sex offender. 386 U.S. 605 (1967). In *State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County, Minn.*, 309 U.S. 270 (1940), it is not set out whether the commitment procedure followed a criminal arrest. In any event, that fact did not enter into the Court's decision.

[10] This is especially true when the procedure for evaluation and treatment were available to the State prior to the criminal sentencing. The State could have requested that the Respondent be committed for "mental examination, evaluation and report" to a state psychiatric hospital. If the report showed a need for pyschiatric care and treatment, that such treatment might materially aid in a person's rehabilitation and that society and that defendant are not likely to be endangered by said treatment in lieu of confinement or imprisonment, the person could be committed to the state security hospital.

at 370 (recognizing that committees charged with offenses are a subset of the "larger class of mentally ill persons who might be found to be sexually dangerous.") The Kansas Supreme Court noted "[t]he legislature concedes that sexually violent predators are not amenable to treatment under K.S.A. 59-2901 *et seq.* If there is nothing to treat under 59-2901, then there is no mental illness. In that light, the provisions of the Act for treatment appear to be somewhat disingenuous." Pet. App. 16a. Indeed, the State's expert witness conceded that Leroy Hendricks does not suffer from a mental illness or a recognized personality disorder. J.A. 256. Although the SVP Act requires proof of a "mental abnormality", the abnormality consists of nothing more or less than a pattern of sexually deviant conduct. J.A. 263, 264. Therefore, the mental condition that triggers commitment is simply the commission of one or more serious crimes, rather than a condition recognized as amenable to treatment by professionals in any field. The SVP Act also requires confinement in a secure facility, K.S.A. 59-29a07(a), in contrast to civil commitments for mental illness and the statute before the Court in *Allen*, which allowed treatment in a range of different setting appropriate to the needs of the individual and the risk to the community through conditional release. 478 U.S. at 369 n.4. Indeed, it is an irony of this case that the State chose to intervene to commit Respondent for treatment at precisely the time that he was scheduled for release that in fact included treatment.

In addition, the Act explicitly contemplates long term confinement, K.S.A. 59-29a01, in contrast to the statute in *Allen*, which "provided for the treatment of those it commits, and established a system under which the committed persons may be released after the briefest time in confinement." 478 U.S. at 370.

2. *Legislative history*

The hearings in the Kansas legislature emphatically bolster the strong inference from the statute itself that

incarceration, not treatment, was the legislative goal. The proponents of the legislation for the most part ignored the treatment of committees under the Act. Instead, they viewed the Act as—in the Attorney General's words—an "opportunity to pass a law that will keep dangerous sex offenders confined past their scheduled prison sentence." J.A. 468. Both the current and former Attorneys General viewed this confinement as effectively permanent. Attorney General Stephan stated "none of them should ever be released," J.A. 468, while his successor hoped the Act would keep sex offenders "locked up indefinitely." J.A. 478. One of the members of the task force that proposed the legislation bluntly informed the legislature that there were no treatment programs that had been found to be effective, that the effect of the legislation would be lifetime incarceration, and that such an outcome was explicitly contemplated by the task force recommending the legislation. J.A. 503.

The legislature was also well aware, from the testimony it heard, that the release standards in the bill were unlikely ever to be met by those committed as sexual predators. Over and over again, witnesses explained that mental health professionals would not be willing to certify that "sexually violent predators" had been cured and were safe to be released to the community. J.A. 483, 509, 567. Without such certification, committees cannot hope for a release hearing at which they could place the burden of proving their continuing dangerousness on the State. Instead, those committed under the Act face the very real possibility of spending a lifetime behind bars without ever having the right to appear in person before a judge for a commitment hearing.[11]

[11] The release procedures for those committed under the SVP Act stand in stark contrast to the procedures for those committed under the State's mental illness commitment provisions. In the case of a commitment under the mental illness law, the patient is entitled to petition for release every ninety days during the first six months of treatment and every 180 days thereafter. K.S.A. 59-2919a. Upon receipt of the request, the matter is set for hearing. Mental illness commitments also allow for conditional release and total release at the direction of the treatment facility without any court involvement. K.S.A. 59-2924. In contrast, those committed under the SVP Act may *never* receive a hearing at which they appear in person, unless the court first finds probable cause or the SRS so recommends, and a person committed under the SVP Act may *never* be released without court involvement.

Finally, the legislative history also shows that the Kanhas legislature was aware that the State did not have the capacity to offer treatment to persons committed under the Act. Warnings about the inadequacy of treatment came directly from the government officials who would be responsible for implementation of the Act. They informed the legislature that that there were no persons on the state hospital staff with the expertise to offer the treatment, that no training for any programs was available in the State and that no funds were provided to obtain supplies or expertise. J.A. 569. The fact that the legislature proceeded to authorize commitment without acting to insure adequate treatment demonstrates that treatment was unimportant, "incidental", to the real purpose of the Act. Even improvements in treatment cannot alter the probative force of the warnings the Kansas legislature seemingly ignored as evidence of the legislature's intent to punish, not to cure.

3. *Implementation*

The history of the SVP Act after its adoption only reaffirms that unmistakable conclusion from the history of the legislation and its text: what was important is that sex offenders were not released at the end of their sentences, insanity or competency commitments. The legislature did not provide funding for the SVP treatment. J.A. 541. The State did not enter into contracts to provide treatment before initiating commitments. J.A. 367. And, once Mr. Hendricks entered State custody as the first committed SVP, the State left responsibility for the treatment pro-

gram in the hands of a clinical director who admitted he was unqualified, and who acknowledged under oath that Mr. Hendricks and the other committees were receiving "essentially no treatment". J.A. 392, 393. Moreover, because there was no real treatment, there could be no way to satisfy the court that a committees' progress justified release. J.A. 400.

The fact that the confinement under the SVP Act is in a DOC facility in which the daily regimen closely resembles that of DOC inmates is further proof that the intent of the legislature was not to treat. The SVP Act begins with the legislature's determination that "the prognosis for rehabilitating sexually violent predators in a prison setting is poor" K.S.A. 59-29a01. But treatment in a prison setting is precisely what the State elected to give them. The Kansas Supreme Court found from the record that "treatment of sexually violent predators is all but nonexistent." Pet. App. 16a. Instead of treatment, the record shows that SVP committees received maximum security confinement indistinguishable in most respects from the conditions of convicted and sentenced prisoners also assigned to the Larned Correctional Mental Health Facility. The two types of inmates have the same kind of rooms, shower facilities, food service, laundry service and medical care. They also share the same outdoor recreation areas, weight rooms, libraries and gym. J.A. 78-81.[12]

This Court should give deference to the "authoritative construction" *Romer v. Evans*, 116 S.Ct. 1620, 1624 (1996), *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967),

[12] By contrast, civil committees in Kansas are guaranteed many specific rights. They are guaranteed the right to wear their own clothing, to use their own possessions, to communicate by phone, to receive conjugal visits if facilities are available, to receive visitors each day, to refuse involuntary labor and to be paid for work. K.S.A. 59-2929. None of these rights are specifically provided for by the SVP Act. The differences in the manner of incarceration provided for by the two schemes clearly indicates that the commitment under the Act is punitive rather than rehabilitative.

of the Kansas Supreme Court's interpretation of the purpose and effect of the SVP Act just as it did to the Illinois Supreme Court in *Allen* and find that, unlike in *Allen*, "the primary objective of the SVP Act is to continue incarceration and not provide treatment."

B. Imprisonment Following Adjudication of Guilt is Historically Deemed Punishment

Once the pretense of treatment is stripped from the SVP Act, its punitive character is unmistakable. History teaches that the *ex post facto* clause and Double Jeopardy Clause must apply to Mr. Hendricks' commitment because it is indistinguishable from a prison sentence. The involuntary incarceration of a person upon proof that he or she committed a criminal act is our paradigm of punishment. To treat imprisonment following adjudication for criminal conduct as a civil remedy "would only be a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond a reasonable doubt to have violated a criminal law." *Foucha v. Louisiana*, 504 U.S. at 83.

In contrast to *Ursery*, where the Court relied on the long history of a *in rem* forfeiture as a civil sanction that could be imposed separately from and in addition to criminal punishment, the Kansas SVP Act has no comparable lineage. Unlike sex offender commitment statutes offered as an alternative to criminal prosecution and punishment, *see Allen*, 478 U.S. 364 (1986), or special sex offender treatment programs offered as an alternative disposition following a conviction, *see Specht*, 386 U.S. 605 (1967), the Kansas statute is explicitly designed not to divert sex offenders in need of treatment from ordinary criminal punishment but rather to add incapacitative confinement on top of punishment already imposed. The Kansas SVP Act is descended directly from legislation enacted in Washington State in 1990, which, like the Kansas statute,

was precipitated by public outcry over a heinous offense committed by a released sex offender. Although the Court has decided a number of cases involving "dangerous sex offender" or "sexual psychopath" statutes, none of these cases involved a statute that resembles the SVP in purpose or effect.

1. *Confinement for the purpose of incapacitation is punishment*

The historically recognized purposes of punishment are served by the Act. "It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." *United States v. Brown*, 381 U.S. 437, 458 (1965). *Accord, Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). "Incapacitation for the protection of society is not an unusual ground for incarceration. '[I]solation of the dangerous has always been considered an important function of the criminal law.'" *Foucha v. Louisiana*, 504 U.S. at 99 (Kennedy, J., dissenting) (quoting *Powell v. Texas*, 329 U.S. 514, 539 (1968) (Black, J., concurring)).

Indeed, this Court has already explicitly held that incarceration as a sexual psychopath following an adjudication of guilt for the purpose of incapacitation is criminal punishment. *Specht v. Patterson*, 386 U.S. 605 (1967). In *Specht*, this Court reviewed whether the imposition of sentence under the Colorado sexual psychopath law violated due process since it was accomplished without a full hearing. Under that act, the State filed criminal charges and proceeded to trial. If a conviction was had, a separate sentencing procedure was initiated to sentence the person convicted, not under the statute for which he stood convicted, but rather, under the sexual psychopath statutes. The petitioner in that case could have been sentenced for

up to 10 years for the original crime. Under the sexual psychopath provisions he stood to be incarcerated from 1 day to life. In that situation, this Court held, "The punishment under the second Act (the sexual psychopath act) is criminal punishment even though it is designed not so much as retribution as it is to keep individual from inflicting harm. 305 U.S. at 608-609. [Footnote omitted; citing *United States v. Brown*, 481 U.S. at 458] From the Court's determination that the incarceration in *Specht*, which was imposed immediately after conviction, was criminal punishment, it follows that the commitment here, which occurred ten years after the adjudication of guilt and after Hendricks had served the sentence imposed must also be considered punishment." [13]

2. *The conditions of the "commitment" under the SVP Act are indistinguishable from a prison sentence*

An examination of the Act and its consequences leaves no doubt that it imposes what would historically be re-

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[13] That incarceration as a sexually violent predator is criminal punishment is also evident from the actions of the same Kansas legislature that passed the SVP Act in passing a *criminal* sentencing enhancement mandating additional criminal punishment for individuals found to be "dangerous sexual predators". K.S.A. 21-4716(a)(G)(i)(b), (ii). More generally, the sentencing provisions of the Kansas criminal code in effect at the time of Mr. Hendricks sentencing recognize that criminal incarceration serves the purposes of incapacitation, as well as retribution.

> This article shall be liberally construed to the end that persons convicted of a crime shall be dealt with in accordance with their individual characteristics, circumstances, needs and potentialities as revealed by case studies; that dangerous offenders shall be correctively treated in custody for long terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, fine or assignment to a community correctional services program whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the offender, or shall be committed for at least a minimum term within the limits provided by law. K.S.A. 21-4601.

garded as punishment. The legislative findings expect the incarceration under the Act to be "very long term" and require that the confinement be accomplished in a "secure facility". K.S.A. 59-29a01. The facility in this case, the Larned Correctional Mental Health Facility, is operated by the Department of Corrections. It is a maximum security facility where committees under the Act have the same rooms, shower facilities, food service, laundry service and medical facilities as DOC inmates. They also share the same outdoor recreation areas, weight rooms, library and gym with DOC inmates.

The DOC provides the facility, perimeter security and internal security to the point of entering the actual quarters of the Sexually Violent Predator area. While under an agreement specifically authorized by the Act, the jailers inside the unit are nominally employees of SRS rather than the Department of Corrections, the name on the uniform of the keeper does not alter the regimen or conditions. As this Court held in *Breed v. Jones*, 421 U.S. 530, 528 (1975), even confinement under the auspices of juvenile authorities is punishment when it is tried, as it is under the Act, to proof that a person has committed a crime.

3. *Adjudication as a sexually violent predator is at least as stigmatizing, if not more, than a criminal conviction*

This Court recognizes the consequences of being found to have committed a criminal act "include both the stigma inherent in such a determination and the deprivation of liberty for many years." *Breed v. Jones*, 421 U.S. at 529. There can be no doubt that labeling a person a "Sexually Violent Predator" serves to publicly stigmatize, disgrace and humiliate a person. The image conjured up by the phrase is of a horrific and inhuman creature. Given the general understanding given to the words, it is not surprising that the individuals who supported the bill described the people who were its subjects as "animals" and "monsters." J.A. 473.

4. *Committment is triggered by the finding beyond a reasonable doubt that a criminal offense has been committed*

The procedures for adjudication under the SVP Act also indicate that from a historical perspective, the SVP adjudication is punitive, for the proceeding closely mirrors that of a criminal trial. The procedure is initiated by the prosecuting attorney (now the Attorney General). There is a probable cause determination. The respondent has the right to counsel and jury trial as provided in criminal cases. Most significantly, without proof beyond a reasonable doubt of the commission of a criminal offense there can be no commitment under the Act. "The compliance with the standard of proof beyond a reasonable doubt is the defining, controlling feature in criminal adjudication, unique to the criminal law". *Foucha*, 501 U.S. at 93 (Kennedy, J., dissenting).

Under the SVP Act, a person must have either been found guilty of a criminal offense, have been found to have committed the offense, but not guilty by reason of insanity, K.S.A. 22-3220, 3221 or must be proven to have committed the offense beyond a reasonable doubt at the commitment hearing if he is incompetent to stand trial in a criminal proceeding. K.S.A. 59-29a07(b). As a result, a factual determination that a person has committed a crime is a precondition of commitment under the SVP Act.

The fact that the commitment is conditioned upon proof of the commission of a crime is "significant of penal and prohibitory intent." *Kurth Ranch*, 114 S.Ct. at 1947. In *Kurth*, only an arrest for possession of an illegal drug was required to impose the tax. In proceedings under the SVP Act, a much closer connection is required. A person must have been found beyond a reasonable doubt to have committed a criminal act for the sanction to be imposed.

The link between the commission of a criminal act and the imposition of a second sanction has been used by the Court in earlier decisions as a factor in determining that

the second sanction violated constitutional protections. In *Lipke v. Lederer*, 259 U.S. 557 (1922), the Court examined the requirement that, "[e]vidence of a crime (Section 29) is essential to assessment under section 35" in determining that the "tax" levied for illegal manufacture or sale of liquor was a penalty. The same examination and the same 'result occurred in *United States v. La Franca*, 282 U.S. 568 (1931).

The SVP Act serves the purposes of punishment by incapacitating persons committed under its provisions. The confinement is in a DOC facility where the regimen closely resembles that of DOC inmates. The stigmatizing label of "sexually violent predator" is applied to committees. Only those who have been found beyond a reasonable doubt to have committed a criminal act are subject to the Act. With the procedural, factual and historical parallels to a criminal punishment, this Court should find that commitment under the Act is punishment.

II. THE SEXUALLY VIOLENT PREDATOR ACT VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST *EX POST FACTO* LAWS

Article 1, Section 9 of the Constitution of the United States provides, "No State shall . . . pass any . . . *ex post facto* law."

An *ex post facto* law has been defined as:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*."

Miller v. Florida, 482 U.S. 423, 429 (1987), quoting *Calder v. Bull*, 3Dall. 386, 390 (1798). (Emphasis in original)

One purpose of the clause is to restrain legislatures from enacting arbitrary, vindictive or oppressive legislation. *Weaver v. Graham*, 450 U.S. 24, 29 (1981); *Miller v. Florida*, 482 U.S. at 429; *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). A legislature's "responsivity to political pressures poses a risk that [it] may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1497 (1994).[14]

As we have demonstrated, the 1994 Kansas Legislature was inundated with demands to keep persons who were in prison for convictions of sex crimes locked up indefinitely. The legislature was spurred on by a terrible crime and a demand for protection of the public. While the criminal law could constitutionally provide for that protection by threatening severe sanctions for individuals who might commit crimes in the future, it could not satisfy the concern that those already sentenced had been dealt with too leniently. The SVP Act was passed to insure that already sentenced individuals would be further punished. The legislative history leaves no doubt that vindictiveness against the ever unpopular class of sex offenders led to legislative overreaching.

Another of the abuses sought to be guarded against by the *ex post facto* clause is that of punishing an individual when no fair warning is given about the consequences of his actions. *Miller*, 482 U.S. at 430; *Weaver*, 450 U.S. at 28. At the time of the commission of his 1984 crimes, Mr. Hendricks had no warning that he could be incarcerated in a prison mental facility indefinitely, after he served whatever sentence was imposed. He had every reason to believe that after serving whatever sentence was

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[14] In *California Department of Corrections v. Morales*, 115 S.Ct. 1597, 1609 (1995), Justice Stevens in his dissent noted: "The danger of legislative overreaching against which the *ex post facto* clause protects is particularly acute when the target of the legislation is a narrow group as unpopular (to put it mildly) as multiple murderers."

imposed, he would be free from any more restraints on his liberty arising out of those actions. He has committed no other acts on which the State can base his continued incarceration.

The Constitution "forbids the application of any new punitive measure to a crime already consummated." *California Department of Corrections v. Morales*, 115 S.Ct. 1597, 1601 (1995). The Sexually Violent Predator Act applies to events occurring before its enactment. The basis for its application to Respondent is his 1984 conviction. The Act obviously operated to increase the sentence of the Respondent. The adjudication operated to transform a sentence with a release date in September, 1994, which Respondent had earned by accumulation of all possible good time, into an indefinite and probable lifelong confinement.

For the reasons stated earlier, the Court should find the Act is punitive in purpose and effect. Because the Act is also both retrospective in application and operates to the increase Respondent's punishment, it must be overturned as a violation of the *ex post facto* clause.[15]

III. RESPONDENT'S ADJUDICATION AND INCAPACITATION AS SEXUAL PREDATOR CONSTITUTES A SECOND PROSECUTION AND PUNISHMENT, IN VIOLATION OF DOUBLE JEOPARDY

In 1984, Respondent entered into a plea agreement with the State of Kansas in which he admitted his guilt to two counts of indecent liberties. In return for Mr. Hendricks' waiver of his constitutional rights, the State agreed to recommend that the defendant receive concurrent terms of 5-20 years imprisonment. Ten years later,

[15] Even if the Court does not find the Act as a whole to be a criminal scheme, the *ex post facto* clause may still be offended by a "civil" law. Such a[n *ex post facto*] law may inflict penalties on the person. . . " *Fletcher v. Peck*, 6 Cranch 137, 138, 162 (1810). While the new law must be penalizing, there is no requirement that it be a criminal enactment. *Collins*, 497 U.S. at 46.

as Respondent was ready to be released from the sentence recommended by the State, the same District Attorney's office that had agreed to the plea bargain filed the sexual predator petition. The sexual predator statute required that, in order to be charged, Respondent have suffered a conviction for a crime of sexual violence, and the specific conduct charged in the petition was Respondent's prior conviction of indecent liberties. The commitment proceeding was in form and effect indistinguishable from a criminal procedure resulting in a new criminal sentence, a second prosecution against Respondent for his crime. Even if it is not regarded as a second prosecution, his commitment is clearly a consecutive indeterminate punishment for his criminal activity. The State's proceedings against him violates double jeopardy.

A. The Sexual Predator Proceedings Against Respondent Constituted a Second Prosecution

This Court has held on numerous occasions that the Double Jeopardy Clause protects a criminal defendant from being prosecuted a second time after conviction of the same offense. *Witte v. United States*, 115 S.Ct. 2199 (1995); *United States v. Halper*, 490 U.S. at 439, 440 (1989); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). This protection expresses the idea, "deeply ingrained in at least the Anglo-American system of jurisprudence, that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.". *Green v. United States*, 355 U.S. 184, 187 (1957). Thus, in the analogous case of *Breed v. Jones*, 421 U.S. 519, 529 (1975), where the court held a "civil" juvenile proceeding which was then followed by an adult prosecution for the same crime to violate double jeopardy, the Court noted that because of the nature and resources of the State, "such a proceeding imposes heavy pressures and burdens—psychological, physical and financial—on

a person charged" which the individual should only be required to bear once.

All of these interests were implicated by the State's conduct in this case. Ten years after Respondent had been placed in jeopardy, entered a guilty plea, and was sentenced for an offense, he was charged, detained, subjected to a lengthy hearing, and ultimately remanded to potentially life-long custody. Since the setting and stakes were at least the equal of his original criminal adjudication, and since, as we have demonstrated, the Sexual Predator Statute is essentially a criminal proceeding, the successive prosecution by the same district attorney's office implicated Respondent's interest in double jeopardy.

B. The Second Prosecution was for the "Same Crime" as Respondent's Conviction for Indecent Liberties

In this case, the State secured in 1984 a conviction against Respondent for indecent liberties, and it then secured a finding that he was a sexual predator, which required his commission of a crime of "sexual violence" based upon that indecent liberties conviction. No conduct committed after the conviction was either charged or was required to be proved.

In determining whether a second prosecution has occurred for the same offense, the Court has inquired whether "each offense contains an element not contained in the other." *United States v. Dixon*, 509 U.S. 688, 696 (1993) (quoting *Blockburger v. United States*, 284 U.S. 299, 302 (1932)). By its terms, the sexually violent predator act requires that the defendant have been convicted or charged with a "sexually violent offense" and it expressly lists "indecent liberties with a child as defined in K.S.A. 21-3503" as one of the sexually violent crimes. K.S.A. 59-29a01(a), (e)(2). Proving the defendant's commission of a sexually violent offense invariably proves one of the two requirements of a commitment, with the State being left to prove that the defendant continued to have a mental abnormality or personality disorder predisposing him toward sexual violence.

In light of this statutory structure, the underlying sexually violent offense is "a species of lesser-included offense", *Illinois v. Vitale*, 447 U.S. 410, 420 (1980), with the greater offense, the sexual predator commitment, incorporating and requiring proof of the same elements as the sexually violent offense. Since the defendant was already convicted of the lesser crime, conviction on the greater violates double jeopardy. *See Brown v. Ohio*, 432 U.S. 161 (1977) (defendant convicted of lesser included offense of joy riding cannot be reprosecuted for greater offense of auto theft).

As this Court has repeatedly made clear, the fact that the State has set forth more than one sexually violent offense that can potentially trigger a sexual predator hearing does not change the analysis. As long as in the present case proof of the lesser crime is necessary, double jeopardy is implicated. For example, in *Whalen v. United States*, 445 U.S. 684 (1980), the Court held that a defendant could not be separately punished for rape and for felony murder based on killing the victim in the course of the rape. The government argued that the greater offense (felony murder) does not always require proof of the lesser (rape), since the predicate offense, according to the government, could have been some other lesser felony. The Court rejected the argument, noting that "in the present case," proof of the particular lesser crime, rape, was a necessary element of the felony murder. Cases both before and after *Whalen* are fully consistent with this view. Thus, in *Harris v. Oklahoma*, 433 U.S. 682 (1977) (per curiam), the Court held that where the defendant was convicted of a felony-murder based upon a robbery with a firearm, he could not thereafter be prosecuted for the underlying robbery offense. *See also United States v. Dixon*, 509 U.S. 688, 697, 698 (1993); (opinion of Scalia, J., and Kennedy, J.) (where contempt sanction was based on violating the terms of a conditional release, and those terms prohibited violating any criminal law, defendant could not subsequently be prosecuted

for violating the drug offense on which the contempt sanction was based.). Because, in this case, the State was required to prove a sexually violent offense, and because the state specifically charged the Respondent with having been convicted on November 1984, of the sexually violent offense of indecent liberties, in violation of K.S.A. 21-3503, precisely the offense of which he had been convicted 10 years before, the predator proceeding constituted a second prosecution for the same offense, in violation of double jeopardy.

C. The Sexual Predator Commitment Constitutes a Second Punishment

Even if the Court does not agree with our submission that the Sexual Predator proceeding is a second prosecution, it nevertheless violates double jeopardy because it consists of a second punishment, indeed a consecutive indeterminate lifetime commitment, for Respondent's offense of indecent liberties. This Court has repeatedly emphasized that the Double Jeopardy Clause serves the function of preventing both successive punishment and succesive prosecution, *Witte v. United States*, 115 S.Ct. 2199, 2204 (1995); *Dixon*, 509 U.S. at 704; *North Carolina v. Pearce*, 395 U.S. 711, 718 (1969) and that "the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as being twice tried for it." *Witte*, 115 S.Ct. at 2204 (*quoting Ex Parte Lange*, 85 U.S. (18 Wall. 163) 173 (1874)).

In *Lange*, the defendant had been convicted for a crime authorizing payment of a fine and or sentence of imprisonment. The court mistakenly sentenced him to both and, after the defendant paid his fine and served five days of his term, he filed a writ of habeas corpus. The trial court attempted to vacate its earlier judgment and reimpose a new sentence of imprisonment. The Supreme Court ordered the defendant released and held that once he had served either lawful part of his previously-imposed sentence, the "power of the court to punish further was

gone." *Id.* at 176. The Court reasoned that the protection against double jeopardy would be of little value if after judgment were rendered against a criminal and sentence executed, "he can again be sentenced on that conviction to another and different punishment, or to endure the same punishment a second time." *Id.* at 173.

Succeeding cases have interpreted this principle to protect a defendant "against additions to a sentence in a subsequent proceeding that upset a defendant's legitimate expectation of finality." *Jones v. Thomas*, 491 U.S. 376, 385 (1989). Thus, "when the Government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." *United States v. Halper*, 490 U.S. 435, 451 n.10 (1989).

The sanction imposed upon Mr. Hendricks in the sexual predator proceeding is an attempt, thinly veiled at best, to seek an additional term of incarceration because the State now believes it may have been too lenient in its criminal adjudication. The State fully possessed the power, in 1984, to seek a lifetime indeterminate sentence of incarceration, with provision for treatment and the possibility of release, upon Mr. Hendricks, as a result of his crime of indecent liberties. The decision of the same prosecutor's office that entered into the plea bargain against Mr. Hendricks to now seek this consecutive indeterminate incarceration touches upon the most basic and long-standing reasons for protection against multiple punishment.

Despite the "civil label of convenience," (*see Breed v. Jones*, 421 U.S. 519, 529 (1975)) attached to the Sexual Predator Act, there is simply no question of its punitive nature. (See Part I). As this Court recognized in *Specht*, there is really no difference between incapacitative confine-

ment pursuant to a criminal offender statute and this type of "civil" commitment. The consequence of the adjudication include both the stigma of being labeled a "predator," a designation at least as devastating as that of being labeled a criminal, and the deprivation of liberty for many years. *Compare Breed*, 421 U.S. at 529. As in *Breed*, the Sexual Predator statute carries the two most telling features of criminal punishment, the requirement of a finding of guilt for past conduct and incarceration had upon that finding. Moreover, as the Kansas Supreme Court correctly found, the State's alternative purpose assigned to its statute, that of "treatment", is "incidental at best" to its primary purpose of incarceration, and cannot render the statute remedial.

Respondent was fully punished for his crime committed in 1984. Respondent never denied he was criminally responsible, and the State never argued he was mentally ill. The State does not argue that Respondent's condition has changed; indeed, it argues that it has been the same for decades. Apparently, the State now believes it should have imposed a greater punishment in 1984 than the sentence it in fact recommended. However, it would be a violation of the most basic policies underlying double jeopardy to allow the State to act upon that belief and incarcerate this 60 year-old, whose sentence has expired, for the rest of his life.

CONCLUSION

Mr. Hendricks requests that the Court affirm the judgment of the Kansas Supreme Court.

Respectfully submitted,

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July 31, 1996

APPENDIX

APPENDIX

K.S.A. 21-4504. Conviction of second and subsequent felonies; exceptions. (b) If a defendant is convicted of a felony a third or subsequent time, the trial judge shall sentence the defendant as follows, upon motion of the prosecuting attorney:

(1) The court shall fix a minimum sentence of not less than the greatest nor more than three times the greatest minimum sentence authorized by K.S.A. 21-4501 and amendments thereto, for the crime for which the defendant is convicted; and

(2) the court may fix a maximum sentence of not less than the least nor more than three times the greatest maximum sentence provided by K.S.A. 21-4501 and amendments thereto, for the crime. . . .

History: L. 1969, ch. 180, § 21-4504; L. 1970, ch. 124, § 10; L. 1973, ch. 141, § 1; L. 1978, ch. 120, § 4; L. 1982, ch. 137, § 2; July 1.

K.S.A. 21-4601. Construction. This article shall be liberally construed to the end that persons convicted of crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities as revealed by case studies; that dangerous offenders shall be correctly treated in custody for long terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, fine or assignment to a community correctional services program whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the offender, or shall be committed for at least a minimum term within the limits provided by law.

History: L. 1969, ch. 180, 21-4601; L. 1986, ch. 123, 4; July 1.

K.S.A. 21-4716. Imposition of presumptive sentence; departure sentencing; finding substantial and compelling

reasons for departure; mitigating or aggravating factor considered in determining if reasons exist; reasons stated on record. (a) The sentencing judge shall impose the presumptive sentence provided by the sentencing guidelines for crimes committed on or after July 1, 1993, unless the judge finds substantial and compelling reasons to impose a departure. If the sentencing judge departs from the presumptive sentence, the judge shall state on the record at the time of sentencing the substantial and compelling reasons for the departure.

(b)(1) Subject to the provisions of subsection (b)(3), the following nonexclusive list of mitigating factors may be considered in determining whether substantial and compelling reasons for a departure exist:

(G) The defendant's current crime of conviction is a crime of extreme sexual violence and the defendant is a predatory sex offender. As used in this subsection:

(I) "Crime of extreme sexual violence" is a felony limited to the following:

(a) A crime involving a nonconsensual act of sexual intercourse or sodomy with any person;

(b) a crime involving an act of sexual intercourse, sodomy or lewd fondling and touching with any child who is 14 or more years, of age but less than 16 years of age and with whom a relationship has been established or promoted for the primary purpose of victimization; or

(c) a crime involving an act of sexual intercourse, sodomy or lewd fondling and touching with any child who is less than 14 years of age.

(ii) "Predatory sex offender" is an offender who has been convicted of a crime of extreme sexual violence as the current crime of conviction and who:

(a) Has one or more prior convictions of any crimes of extreme sexual violence. Any prior conviction used to establish the defendant as a predatory sex offender pursuant to this subsection shall also be counted in determining the criminal history category; or

(b) suffers from a mental condition or personality disorder which makes the offender likely to engage in additional acts constituting crimes of extreme sexual violence.

(iii) "Mental condition or personality disorder" means an emotional, mental or physical illness, disease, abnormality, disorder, pathology or condition which motivates the person, affects the predisposition or desires of the person, or interferes with the capacity of the person to control impulses to commit crimes of extreme sexual violence.

In determining whether aggravating factors exist as provided in this section, the court shall review the victim impact statement.

History: L. 1992, ch. 239, 16; L. 1993, ch. 291, 263; Amended, L. 1994, ch. 341, 2; July 1.

K.S.A. 22-3220. [Effective January 1, 1996.] [Mental disease or defect; availability as defense.] It is a defense

It is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense. The provisions of this section shall be in force and take effect on and after January 1, 1996.

History. L. 1995, ch. 251, 20; January 1, 1996.

K.S.A. 22-3221. [Effective January 1, 1996.] [Same; submission of special question to jury upon return of not guilty verdict of charged offense.]

In any case in which the defense has offered substantial evidence of a mental disease or defect excluding the mental state required as an element of the offense charged, and the jury returns a verdict of "not guilty," the jury shall also answer a special question in the following form:

"Do you find the defendant not guilty solely because the defendant, at the time of the alleged crime, was suffering from a mental disease or defect which rendered the defendant incapable of possessing the required criminal intent?" The provisions of this section shall be in force and take effect on and after January 1, 1996.

History. L. 1995, ch. 251, 21; January 1, 1996.

K.S.A. 22-3429. Deferring sentence pending mental examination. After conviction and prior to sentence and as part of the presentence investigation authorized by K.S.A. 21-4604, the trial judge may order the defendant committed to a state hospital or any suitable local mental health facility for mental examination, evaluation and report. If adequate private facilities are available and if the defendant is willing to assume the expense thereof such commitment may be to a private hospital. A report of the examination and evaluation shall be furnished to the judge and shall be made available to the prosecuting attorney and counsel for the defendant. A defendant may not be detained for more than 120 days under a commitment made under this section.

History: L. 1970, ch. 129, 22-3429; July 1.

K.S.A. 22-3430. Commitment to certain state institutions, when; costs; order of commitment; appeal. If the report of the examination authorized by the preceding section shows that the defendant is in need of psychiatric are and treatment and that such treatment may materially aid in his rehabilitation and that the defendant and society is not likely to be endangered by permitting the defendant to receive such psychiatric care and treatment, in lieu of confinement or imprisonment, the trial judge shall have power to commit such defendant to any state or county institution provided for the reception, care, treatment and maintenance of mentally ill persons. The court may direct that the defendant be detained in such institution until

further order of the court or until the defendant is discharged under K.S.A. 22-3431. No period of detention under this section shall exceed the maximum term provided by law for the crime of which the defendant has been convicted. The trial judge shall, at the time of such commitment make an order imposing liability upon the defendant, or such person or persons responsible for the support of the defendant, or upon the county or the state, as may be proper in such case, for the cost of admission, care and discharge of such defendant.

The defendant may appeal from any order of commitment made pursuant to this section in the same manner and with like effect as if sentence to a jail, or to the custody of the director of penal institutions had been imposed in this case.

History: L. 1970, ch. 129, § 22-3430; July 1.

K.S.A. 22-3431. Disposition upon completion of treatment. Whenever it appears to the chief medical officer of the institution to which a person has been committed under K.S.A. 22-3430 and amendments thereto, that such person is not dangerous to self or others and that such person will not be improved by further detention in such institution, such person shall be returned to the court where convicted and shall be sentenced, committed, granted probation, assigned to a community correctional services program or discharged as the court deems best under the circumstance. The time spent in a state or county institution pursuant to a commitment under K.S.A. 22-3430 and amendments thereto shall be credited against any sentence, confinement or imprisonment imposed on the defendant.

History: L. 1970, ch. 129, 22-3431; L. 1971, ch. 114, 8; L. 1986, ch. 123, 22; July 1.

K.S.A. 22-3717. Parole eligibility; release, when; hearings; rules and regulations; conditions of parole: (a) Ex-

cept as otherwise provided by this section, an inmate, including an inmate sentence pursuant to K.S.A. 21-4618 and amendments thereto, shall be eligible for parole after serving the entire minimum sentence imposed by the court, less good time credits. . .

History: L. 1970, ch. 129, 22-3717; L. 1972, ch. 317, 90; L. 1973, ch. 339, 88; L. 1974, ch. 403, 10; L. 1975, ch. 203, 1; L. 1976, ch. 168; 2; L. 1978, ch. 120, 13; L. 1979, ch. 94, 2; L. 1981, ch. 156, 1; L. 1982, ch. 137; 3; L. 1982, ch. 150, 2; L. 1983, ch. 116, 1; L. 1984, ch. 131, 1; L. 1985, ch. 111, 2; L. 1986, ch. 128, 3; L. 1986, ch. 123, 25; L. 1986, ch. 136, 3; L. 1987, ch. 118, 1; L. 1988, ch. 115, 1; May 19.

K.S.A. 22-3718. Conditional release. An inmate who has served the inmate's maximum term or terms, less such work and good behavior credits as having been earned, shall, upon release, be subject to such written rules and conditions as the Kansas parole board may impose, until the expiration of the maximum term or terms for which the inmate was sentenced or until the inmate is otherwise discharged. . . .

History: L. 1970, ch. 129, 22-3718; L. 1972, ch. 317, 91; L. 1986, ch. 128, 4; July 1.

K.S.A. 59-2901. Name and citation of act. The provisions of K.S.A. 59-2901 through 59-2941 and amendments thereto and K.S.A. 1993 Supp. 59-2943 and 59-2944 and amendments thereto shall be known and may be cited as the treatment act for mentally ill persons.

History: L. 1965, ch. 348, 1; 1976, ch. 243, 1; L. 1986, ch. 211, 1; L. 1990, ch. 92, 16; Jan. 1, 1991.

K.S.A. 59-2902. Definitions. When used in the treatment act for mentally ill persons:

(a) "Conditional release" means release of a patient who has not been discharged but who is permitted by the

head of the treatment facility to live apart from the treatment facility pursuant to K.S.A. 59-2924 and amendments thereto.

(b) "Discharge" means the final and complete release from treatment, by either an order of a court pursuant to K.S.A. 59-2923 and amendments thereto or a treatment facility.

(c) "Head of the treatment facility" means the administrative director of a treatment facility or such person's designee.

(d) "Involuntary patient" means a mentally ill person who is receiving treatment under order of a court of competent jurisdiction.

(e) "Lacks capacity to make an informed decision concerning treatment" means that the person, by reason of the person's mental disorder or condition, is unable, despite conscientious efforts at explanation, to understand basically the nature and effect of hospitalization or treatment or is unable to engage in a rational decision-making process regarding hospitalization or treatment, as evidenced by inability to weigh the possible risks and benefits.

(f) "Law enforcement officer" means any sheriff, regularly employed deputy sheriff, state highway patrol officer, regularly employed city police officer, law enforcement officer of any county law enforcement department or regularly employed police officer of any university, community college or Haskell institute, if such police officer of a university, community college or Haskell institute has completed not less than 320 hours of law enforcement instruction at the law enforcement training center or in a training program approved under K.S.A. 74-5604a and amendments thereto.

(g) "Likely to cause harm to self or others" means that the person:

(1) Is likely, in the reasonably foreseeable future, to cause substantial physical injury or physical abuse to self or others or substantial damage to another's property, as evidenced by behavior causing, attempting or threatening such injury, abuse or damage; or

(2) Is substantially unable, except for reason of indigency, to provide for any of the person's basic needs, such as food, clothing, shelter, health or safety causing a substantial deterioration of the person's ability to function on the person's own.

(h) "Mentally ill person" means any person who:

(1) Is suffering from a severe mental disorder to the extent that such person is in need of treatment;

(2) lacks capacity to make an informed decision concerning treatment; and

(3) is likely to cause harm to self or others.

No person who is being treated by prayer in the practice of the religion of any church which teaches reliance on spiritual means alone through prayer for healing shall be determined to be a mentally ill person unless substantial evidence is produced upon which the district court finds that the proposed patient is likely, in the reasonably foreseeable future, to cause substantial physical injury or physical abuse to self or others or substantial damage to another's property, as evidence by behavior causing, attempting or threatening such injury, abuse or damage.

(I) "Patient" means a person who is a voluntary patient, a proposed patient or an involuntary patient.

(j) "Physician" means a person licensed to practice medicine and surgery as provided by the Kansas healing arts act or a person who is employed by a Kansas state hospital or by an agency of the United States and who is authorized by either government to practice medicine and surgery.

(k) "Proposed patient" means a person for whom an application pursuant to K.S.A. 59-2913 and amendments thereto has been filed.

(l) "Psychologist" means a licensed psychologist, as defined by K.S.A. 74-5302 and amendments thereto.

(m) "Restraints" means the application of any devices, other than human force alone, to any parts of the body of the patient for the purpose of preventing the patient from causing injury to self or others.

(n) "Seclusion" means the placement of a patient, alone, in a locked room, where the patient's freedom to leave is restricted and where the patient is not under continuous observation.

(o) "Severe mental disorder" means a clinically significant behavioral or psychological syndrome or pattern associated with either a painful symptom or serious impairment in one or more important areas of functioning and involving substantial behavioral, psychologic or biologic dysfunction. "Severe mental disorder" does not include a condition which is caused by the use of chemical substances or for which the primary diagnosis is antisocial personality.

(p) "Treatment" means any service intended to promote the mental health of the patient and rendered by a qualified professional licensed or certified by the state to provide such service as an independent practitioner or under the supervision of such practitioner.

(q) "Treatment facility" means any mental health center or clinic, psychiatric unit of a medical care facility, psychologist, physician or other institution or individual authorized or licensed by law to provide either inpatient or outpatient treatment to any patient.

(r) "Voluntary patient" means a person who is receiving treatment at a treatment facility other than by order of any court.

(s) The terms defined in K.S.A. 59-3002 and amendments thereto shall have the meanings provided by that section.

(t) "Mental health center" means any community mental health center organized pursuant to the provisions of K.S.A. 19-4001 through 19-4015, and amendments thereto, or mental health clinic organized pursuant to the provisions of K.S.A. 65-211 through 65-215, and amendments thereto, and licensed in accordance with the provisions of K.S.A. 75-3307b and amendments thereto.

(u) "Participating mental health center" means a mental health center which has entered into a contract with the secretary of social and rehabilitation services to provide screening, treatment and evaluation, court ordered evaluation and other treatment services pursuant to the treatment act for mentally ill persons, in keeping with the phased concept of the mental health reform act.

(v) "State phychiatric hospital" means Larned state hospital, Osawatomie state hospital, Rainbow mental health facility and Topeka state hospital.

(w) "Qualified mental health professional" means (1) a physician or psychologist who is employed by a participating mental health center or who is providing services as a physician or psychologist, respectively, under a contract with a participating mental health center, or (2) a registered masters level psychologist or a licensed specialist social worker or licensed master social worker or a registered nurse who has a specialty in psychiatric nursing who is employed by a participating mental health center and who is acting under the direction of a physician.

(x) "Registered masters level psychologist" means a person registered as a registered masters level psychologist by the behavioral sciences regulatory board under K.S.A. 74-5361 through 74-5373 and amendments thereto.

(y) "Licensed specialist social worker" means a person licensed in a social work practice specialty by the behavioral sciences regulatory board under K.S.A. 65-6301 through 65-6318 and amendments thereto.

(z) "Licensed master social worker" means a person licensed as a master social worker by the behavioral sciences regulatory board under K.S.A. 65-6301 through 65-6318 and amendments thereto.

(aa) "Secretary" means the secretary of social and rehabilitation services.

(bb) "Osawatomie state hospital catchment area" means, except as otherwise defined by rules and regulations of the secretary adopted pursuant to K.S.A. 39-1613 and amendments thereto, the area composed of the following counties: Allen, Anderson, Atchison, Bourbon, Butler, Chautauqua, Cherokee, Cowley, Crawford, Elk, Franklin, Jefferson, Johnson, Labette, Leavenworth, Linn, Miami, Montgomery, Neosho, Wilson, Woodson and Wyandotte.

(cc) "Topeka state hospital catchment area" means, except as otherwise defined by rules and regulations of the secretary adopted pursuant to K.S.A. 39-1613 and amendments thereto, the area composed of the following counties: Brown, Chase, Clay, Cloud, Coffey, Dickinson, Doniphan, Douglas, Ellsworth, Geary, Greenwood, Harvey, Jackson, Jewell, Lincoln, Lyon, Marion, Marshall, McPherson, Mitchell, Morris, Nemaha, Osage, Ottawa, Pottawatomie, Republic, Riley, Saline, Sedgwick, Shawnee, Wabaunsee and Washington.

(dd) "Larned state hospital catchment area" means, except as otherwise defined by rules and regulations of the secretary adopted pursuant to K.S.A. 39-1613 and amendments thereto, the area composed of the following counties: Barber, Barton, Cheyenne, Clark, Comanche, Decatur, Edwards, Ellis, Finney, Ford, Gove, Graham, Grant, Gray, Greeley, Hamilton, Harper, Haskell, Hodge-

man, Kearny, Kingman, Kiowa, Lane, Logan, Meade, Morton, Ness, Norton, Osborne, Pawnee, Phillips, Pratt, Rawlins, Reno, Rice, Rooks, Rush, Russell, Scott, Seward, Sheridan, Sherman, Smith, Stafford, Stanton, Stevens, Sumner, Thomas, Trego, Wallace and Wichita.

(ee) "Catchment area" means the Osawatomie state hospital catchment area, the Topeka state hospital catchment area or the Larnad state hospital catchment area.

(ff) "Direction" means monitoring and oversight including regular, periodic evaluation of services.

History: L. 1965, ch. 348, 2; L. 1976, ch. 243, 2; L. 1976, ch. 242, 69; L. 1977, ch. 199, 1; L. 1978, ch. 223, 1; L. 1982, ch. 238, 1; L. 1986, ch. 211, 2; L. 1988, ch. 202, 1; L. 1990, ch. 92, 17; L. 1993, ch. 225, 3; April 22.

K.S.A. 59-2919. Order for admission to state psychiatric hospital. All orders of referral to or treatment in a state psychiatric hospital shall be made on the form prescribed by the secretary of social and rehabilitation services. Admission shall be to the state psychiatric hospital previously designated by the secretary of social and rehabilitation services to accept persons from the area of the court's jurisdiction and, if requested by the head of the treatment facility, at a time specified by the head of the treatment facility, which time shall be not more than 15 days after the date of the order. Notice of the order shall be given immediately to the designated psychiatric hospital.

History: L. 1965, ch. 348, 19; L. 1976, 243, 22; L. 1986, ch. 211, 16; July 1.

K.S.A. 59-2924. Transfer; discharge; conditional release. (a) The secretary of social and rehabilitation services or the secretary's designee may transfer any patient from any state psychiatric hospital under the secretary's control to any other state psychiatric hospital whenever the secretary or the secretary's designee considers it to be in the

best interests of the patient. Except in the case of an emergency, the patient's next of kin or guardian, if one has been appointed, shall be notified of the transfer, and notice shall be sent to the committing court not less than 14 days before the proposed transfer. The notice shall state the location to which the transfer is proposed and state that, upon request of the next of kin or guardian, an opportunity for a hearing on the proposed transfer will be provided by the secretary of social and rehabilitation services prior to such transfer.

(b) The secretary of social and rehabilitation services or the designee of the secretary may transfer any involuntary patient from any state psychiatric hospital to any state institution for the mentally retarded whenever the secretary of social and rehabilitation services or the designee of the secretary considers it to be in the best interests of the patient. Any patient transferred as provided in this subsection shall remain subject to the same statutory provisions as were applicable at the hospital from which the patient was transferred and in addition thereto shall abide by and be subject to all the rules and regulations of the institution to which the patient has been transferred. Except in the case of an emergency, the patient's next of kin or guardian, if one has been appointed, shall be notified of the transfer, and notice shall be sent to the committing court not less than 14 days before the proposed transfer. The notice shall state the location to which the transfer is proposed and state that, upon request of the next of kin or guardian, an opoprtunity for a hearing on the proposed transfer will be provided by the secretary of social and rehabilitation services prior to such transfer. No involuntary patient shall be transferred from a state psychiatric hospital to a state institution for the mentally retarded unless the superintendent of the receiving institution has found that the patient is mentally retarded and in need of care and training and that placement in the institution is the least restrictive alternative available. Nothing in this subsection shall prevent the secretary of

social and rehabilitation services or the designee of the secretary from allowing a person to be admitted as a voluntary resident to a state institution for the mentally retarded, or from discharging such person from a state psychiatric hospital.

(c) When any proposed patient or involuntary patient has been ordered to any treatment facility pursuant to K.S.A. 59-2909, 59-2912, 59-2917 or 59-2918, and amendments thereto, the head of the treatment facility shall discharge the patient when the patient is no longer in need of treatment in the facility, except that no patient shall be discharged from a state psychiatric hospital, if there is a participating mental health center serving the area where the patient intends to reside, without receiving recommendations from such participating mental health center. The head of the treatment facility shall review and investigate all applications for involuntary admission and, if appropriate, shall divert patients to less restrictive alternatives before further judicial proceedings occur whenever it is deemed appropriate by the head of the treatment facility. If diversion from involuntary treatment is not appropriate, the head of the treatment facility should be prepared to present evidence at the next hearing scheduled for the patient concerning further need for involuntary treatment.

(d) The head of the treatment facility may release any involuntary patient who has been committed for treatment pursuant to K.S.A. 59-2917 or 59-2918, and amendments thereto, on conditional release when the head of the treatment facility believes that (1) the release is in the best interests of the patient and (2) the patient is not likely to cause harm to self or others as long as the patient continues a plan of treatment in the community. The treatment facility shall formulate a plan of treatment for each patient released on conditional release. The plan of treatment may include any conditions which the head of the treatment facility considers to be in the best interests of the patient or necessary to ensure that the patient is not

likely to cause harm to self or others. The conditions may include a requirement that the patient be supervised by and report to a treatment facility which shall be responsible for ensuring that the patient complies with the conditions. The treatment facility in the community shall inform the head of the treatment facility from which the patient was discharged of any material noncompliance with the treatment plan. The head of the treatment facility from which the patient is released may change the plan or treatment or the conditions specified in the plan whenever the head considers it to be in the best interests of the patient or necessary to ensure that the patient is not likely to cause harm to self or others. If the patient fails to comply with any conditions of the treatment plan, the head of the facility may revoke the release and order the patient readmitted to the facility. The head of the treatment facility may authorize and order a law enforcement officer or other person to take into custody and transport the patient to a treatment facility.

Prior to the end of the 120 days on conditional release, and not less often than each 120 days thereafter while a patient is on conditional release, the head of the treatment facility from which the patient is released shall reexamine the facts relating to the treatment of the patient on conditional release.

(e) The head of the treatment facility shall not discharge an involuntary patient from conditional release unless at least seven days' notice of the intention to discharge the patient is given to the patient's guardian, if any, and to any other treatment facility which is involved in the treatment plan for the patient.

(f) Nothing in this section shall be construed to amend or modify or repeal any law relating to the confinement of persons charged with or convicted of a criminal offense.

History: L. 1965, ch. 348, 24; L. 1967, ch. 319, 1; L. 1976, ch. 243, 27; L. 1982, ch. 238, 2; L. 1986, ch. 211, 20; L. 1990, ch. 92, 29; Jan. 1, 1991.

K.S.A. 59-2927a. Administration of medications and other treatments. (a) Medications and other treatments shall be prescribed, ordered and administered only in conformity with accepted clinical practice. Medication shall be administered only in accordance with the written order of a physician or upon a verbal order noted in the patient's medical records and subsequently signed by the physician. The attending physician shall review regularly the drug regimen of each patient or proposed patient under the physician's care and shall monitor any symptoms of harmful side effects. Precriptions for psychotropic medications shall be written with a termination date not exceeding 30 days thereafter but may be renewed.

(b) Any patient who is receiving treatment pursuant to the provisions of K.S.A. 59-2909, 59-2912, 59-2917 or 59-2918, and amendments thereto, and who objects to medication prescribed shall have such objection recorded and entered in the patient's medical record. If 'after a full explanation of the reasons for the medication such patient still objects to the medication, it may be administered over the patient's objections. Such objections must be submitted to administrative review by the medical director or psychiatric designee within five days of the objection. In no case shall experimental medication be administered without the patient's consent.

(c) During the course of treatment the responsible physician or psychologist or such person's designee shall consult with the patient, or the patient's guardian, and give consideration to the views the patient or guardian expresses concerning treatment and any alternatives.

(d) Consent for medical or surgical treatments not intended primarily to treat a patient's mental disorder shall be obtained in accordance with applicable law.

History: L. 1986, ch. 211, 26; July 1.

K.S.A. 59-2928. Restraints and seclusions. (a) Restraints or seclusion shall not be applied to a patient unless it is determined by the head of the treatment facility or a physician or psychologist to be required to prevent substantial bodily injury to such patient or others. The extent of the restraint or seclusion applied to the patient shall be the least restrictive measure necessary to prevent injury to the patient or others, and the use of restraint or seclusion in a treatment facility other than a licensed adult care home shall not exceed three hours without medical reevaluation, except that such medical reevaluation shall not be required, unless necessary, between the hours of 12:00 midnight and 8:00 a.m. Reevaluation of the use of restraint or seclusion in a treatment facility which is a licensed adult care home shall be made at a frequency specified by the treating physician or psychologist. When restraints or seclusion are applied, there shall be monitoring of the patient's condition at a frequency determined by the treating physician or psychologist, which shall be no less than once per hour. The head of the treatment facility or a physician or phychologist shall sign a statement explaining the treatment necessity for the use of any restraint and seclusion and shall make such statement a part of the permanent treatment record of such patient.

(b) The provisions of subsection (a) shall not prevent, for a period not exceeding two hours without review and approval thereof by the head of the treatment facility or a physician or psychologist:

(1) Staff at the state security hospital from confining patients in their rooms when it is considered necessary for security or proper institutional management;

(2) the use of such restraints as necessary for a patient who is likely to cause physical injury to self or others without the use of such restraints; or

(3) the use of restraints when needed primarily for examination or treatment or to insure the healing process.

History: L. 1965, ch. 348, 28; L. 1976, ch. 243, 31; L. 1986, ch. 211, 22; L. 1988, ch. 203, 1; April 21.

K.S.A. 59-2929. Rights of patients. (a) Every patient being treated in any treatment facility, in addition to all other rights preserved by the provisions of this act, shall have the following rights:

(1) To wear the patient's own clothes, keep and use the patient's own personal possessions including toilet articles and keep and be allowed to spend the patient's own money;

(2) to communicate by telephone, both to make and receive confidential calls, and by letter, both to mail and receive unopened correspondence, except that if the head of the treatment facility should deny a patient's right to mail or receive unopened correspondence under the provisions of subsection (b), such correspondence shall be opened and examined in the presence of the patient;

(3) to conjugal visits if facilities are available for such visits;

(4) to receive visitors each day;

(5) to refuse involuntary labor and to be paid for any work performed other than the housekeeping of the patient's own bedroom and bathroom subject to the provisions of K.S.A. 1993 Supp. 59-2943;

(6) not to be subject to such procedures as psychosurgery, electroshock therapy, experimental medication, aversion therapy or hazardous treatment procedures without the written consent of the patient and the written consent of a parent, guardian or other person in loco parentis, if such patient has a living parent or a guardian or other person in loco parentis;

(7) to have explained, the nature of all medications prescribed, the reason for the prescription and the most common side effects and, if requested, the nature of any other treatments ordered;

(8) to communicate by letter with the secretary of social and rehabilitation services, the head of the treatment facility and any court, physician, psychologist, minister of religion, including Christian Science practitioner or attorney. All such communications shall be forwarded at once to the addressee without examination and communications from such persons shall be delivered to the patient without examination;

(9) to be visited by the patient's physician, psychologist, minister of religion, including Christian Science practitioner or attorney at any time; and

(10) to be informed orally and in writing of the patient's rights under this section upon admission to a treatment facility.

(b) The head of the treatment facility may, for good cause only, restrict a patient's rights under this section, except that the rights enumerated in subsections (a)(5) through (a)(10), and the right to mail any correspondence which does not violate postal regulations, shall not be restricted by the head of the treatment facility under any circumstances. Each treatment facility shall adopt regulations governing the conduct of all patients being treated in such treatment facility, which regulations shall be consistent with the provisions of this section. A statement explaining the reasons for any restriction of a patient's rights shall be immediately entered on such patient's medical record and copies of such statement shall be available to the patient and the parent, guardian or person in loco parentis, if such patient is less than 18 years of age, and the patient's attorney. In addition, notice of any restriction of a patient's rights shall be communicated to such persons in a timely fashion.

(c) Any person willfully depriving any patient of the rights protected by this section, except for the restriction of such rights in accordance with the provisions of subsection (b), shall be guilty of a class C misdemeanor.

History: L. 1965, ch. 348, 29; L. 1976, ch. 243, 32; L. 1986, ch. 211, 23; July 1.

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Nos. 95-9515 and 95-9575

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STATE OF KANSAS,
Petitioner and
Cross Respondent,

v.

LEROY HENDRICKS,
Respondent and
Cross Petitioner.

On Writ of Certiorari to the Supreme Court of Kansas

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STATEMENT OF THE CASE

In 1994 the Kansas Legislature passed the Sexually Violent Predator Act (SVP Act). The Act is aimed at providing a means to keep sex offenders who are perceived to be dangerous incarcerated after the expiration of their prison terms. Unlike other sex offender commitment schemes, the SVP Act does not provide a dispositional alternative to traditional prosecution and sentencing. Instead it provides for the institution of the commitment proceeding only after the offender is about to be released from incarceration.

In 1984, Mr. Hendricks entered into a plea agreement with the State of Kansas providing that he be sentenced to a term of 5 to 20 years incarceration for two counts of taking indecent liberties with a child for fondling two thirteen year old boys who came into the electronics store where he worked. A third count arising out of the same incident was dismissed. The State did not request consecutive sentences or enhanced sentences.[1] The State did not request evaluation or treatment of Mr. Hendricks at a state psychiatric facility. Pet. App. 3a.[2]

Mr. Hendricks served his sentence without incident. He earned all possible good time and was scheduled to be released on September 11, 1994. J.A. 5. Upon his release, he would have been under supervision requiring him to live in a halfway house and receive group and individual counseling. J.A. 183, 186.

The Sexually Violent Predator Act

In response to the rape and murder of a young woman named Stephanie Schmidt by Donald Ray Gideon, a co-

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[1] Under the sentencing laws in effect at the time Mr. Hendricks committed his crimes, he could have been sentenced to a term of 45 to 180 years. He would have first been eligible for parole upon reaching age 73 in 2007. The law would not have required his release, if he earned all possible good time, until 2074.

[2] A more complete statement of the case is set forth in the Cross Petitioner's Brief. That statement is adopted by reference.

worker who had recently been released on parole from a sentence for rape, an *ad hoc* task force was formed by the victim's family and others to lobby for passage of the SVP Act. Pet. App. 25a. The Act, similar to legislation first passed in 1990 in Washington, provides for a "civil commitment" of persons who according to the legislative "findings" comprise a "small but extremely dangerous group" of "predators" who do not have a mental defect or disease that renders them appropriate for treatment under the existing involuntary treatment statutes. K.S.A. 59-29a01.

The SVP Act applies to persons prosecuted for any sex offense, except consensual sodomy, and any other crime which is alleged to be sexually motivated, who are convicted and sentenced, found not guilty by reason of insanity after proof that the person committed the offense, or found incompetent to stand trial and later proved to have committed the charged offense beyond a reasonable doubt at a special hearing. K.S.A. 59-29a03. Members of the group are found to have "antisocial personality features which are unamenable to existing mental illness treatment modalities" and are likely to engage in future acts of sexual violence. Further, the prognosis for treatment of these individuals is "poor" and the treatment needs are "very long term". Pet. App. 60a, K.S.A. 59-29a01.

The SVP Act defines "sexually violent predator" as:

> "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." Pet. App. 60a, K.S.A. 59-29a02 (a).

The SVP Act defines "mental abnormality" as:

> "any congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." Pet. App. 60a, K.S.A. 59-29a02(b).

The SVP Act commitment provisions apply only to those about to be released from total confinement. While in most cases it will apply to persons being released from prison sentences which is the case before the Court, it also can be used to extend the confinement of a person found not guilty by reason of insanity who is no longer insane but is perceived to be dangerous. K.S.A. 59-29a03. The prosecuting attorney (now the Attorney General) is notified of the pending release and determines whether a petition should be filed shortly before the person's release. K.S.A. 59-29a04. After the filing, a probable cause finding is required followed by a trial. Either party or the judge may request a jury trial. The Act generally provides for procedural safeguards paralleling a criminal trial. K.S.A. 59-29a05, 29a06.

If the person is found to be a sexually violent predator, the court must order commitment to the custody of the Secretary of Social and Rehabilitation Services (SRS). SRS, in turn, is empowered to enter into a contract with the Department of Corrections (DOC) to provide a facility. The person is segregated from mentally ill persons and is not provided the specific guarantees of rights or privileges of mentally ill committees. K.S.A. 59-29a07.

The Commitment Proceedings

On August 17, 1994, the same prosecutor's office that had entered into a plea agreement with Mr. Hendricks in 1984 filed a petition to have him committed as a sexually violent predator. J.A. 4. At the probable cause hearing held two days later, the State relied on the testimony of Dan Crask, a licensed specialist clinical social worker who had never spoken to Mr. Hendricks. In his testimony, which was based on a review of ten year old reports, he

opined that Mr. Hendricks had pedophilia and that people with pedophilia may stop their behavior occasionally after incarceration, but tend to repeat that behavior over time. J.A. 24-26. He further testified that pedophilia is not a personality disorder. He could not give the court a definition of "mental abnormality." J.A. 28. Mr. Hendricks moved for dismissal of the petition on the grounds that the procedure violated constitutional provisions including *ex post facto,* double jeopardy, substantive due process and equal protection. J.A. 32-35. The court deferred ruling on the motion. J.A. 36-43.

At the commitment trial, the State began its evidence by calling Mr. Hendricks to testify.[3] He outlined his family background. J.A. 126-130, as well as his previous sexual offenses against children. J.A. 130-172. He stated that during his latest incarceration he had received no treatment for any sexual disorder.[4] He stated that he had not had any urge to have sexual contact with children since 1985, and he was aware that if he re-offended, he would spend the rest of his life in prison. J.A. 187. He acknowledged however, that he was a "pedophile" and while he hoped that he would not re-offend, the only way he could "guarantee" that he never would was to die. J.A. 190.

Dr. Charles Befort, the chief psychologist at Larned Security Hospital, testifying for the State, maintained that Mr. Hendricks was neither mentally ill nor suffering from a personality disorder. J.A. 256-257.[5] He also stated

[3] As a consequence of its ruling that the commitment proceeding was "civil" the district court concluded that Mr. Hendricks had no privilege against self incrimination. J.A. 42.

[4] Mr. Hendricks testified that he had been offered treatment in prison but he had not enrolled in it. He said his reasons included a desire to work, which would not have been possible in treatment, and that he had been told, "There is no cure for your type." J.A. 143, 235.

[5] There is no limitation in Dr. Befort's testimony, as alleged by the State, that the lack of mental illness is "within the meaning of the traditional Kansas civil commitment statute" rather than a more generally accepted definition of the psychological profession.

that the statutory definition of the term "mental abnormality" was circular, in that the behavior was used both to identify the conditon and to predict future behavior. J.A. 263-264. Dr. Befort labeled Mr. Hendricks as a pedophile and stated that, in his interpretation of the statute, pedophilia was a "mental abnormality." He also acknowledged that his interpretation was open to debate. J.A. 271-272. He further opined that Mr. Hendricks would engage either in acts of sexual violence or sex acts with children if permitted to do so, based in large part on his belief that behavior is a good predictor of behavior. J.A. 247-248. He interpreted the term "likely" in the SVP Act to mean more probable than not. J.A. 260-261, 279. Dr. Befort never hazarded a guess about when in the future Mr. Hendricks' sexual conduct might occur.

Mr. Hendricks presented testimony from a forensic psychiatrist, Dr. William Logan, that in making predictions regarding long term future dangerousness, psychiatrists were wrong two thirds of the time. Dr. Logan further testified that studies of recidivism of pedophiles showed an average re-offense rate following treatment of 15% and an average re-offense rate without treatment of 17%. J.A. 328-329. Dr. Logan opined that based upon a reasonable degree of medical probability or certainty a mental health professional cannot predict whether an individual is more likely than not to engage in future acts of sexual predation. J.A. 331.

Mr. Hendricks was found to be a sexually violent predator and committed to Larned State Security Hospital even though no contractor had been retained to provide treatment nor had any new staff been added to provide treatment to SVP Act committees. J.A. 366-372. Even though the staff at that facility, did not have the equipment, training or expertise to provide treatment, J.A. 483, 484, 552, the district court found that SRS had established a treat-

ment program *available perhaps at some time in the future*. J.A. 387 (emphasis added).

That point in the future had not yet arrived when Dr. Befort, now Acting Clinical Director of the Sexual Predator Treatment Program, testified ten months later in a state *habeas corpus* hearing. Echoing the claims of SRS officials before him that treatment was at hand,[6] Dr. Befort testified that the sexual predator treatment program had "plenty of funding and lots of space" J.A. 395, and that it was "about ready to start up full steam." J.A. 413. When brought back to a description of what was actually provided, Dr. Befort told the court that Mr. Hendricks and other persons committed under the SVP Act were receiving "essentially no treatment." J.A. 393. He elaborated by stating that even though he was the Acting Clinical Director, he did not feel he was fully qualified to be in that position. J.A. 392. He further testified that there were no clinical staff giving treatment to SVP Act committees except for himself. J.A. 392. He said he could not give effective treatment to Mr. Hendricks, or the other committees, because he was the person whose testimony had resulted in their involuntary commitment. J.A. 396-397. Dr. Befort also testified that on the sporadic occasions when a group session was held, they were primarily gripe sessions about the lack of treatment and did not address sexual deviancy issues. J.A. 398-399.

Dr. Befort did state that the committees were receiving "ward milieu" therapy.[7] He said "ward milieu means that the environment, the atmosphere, what goes on in terms

[6] In testimony at a pretrial hearing, the SRS official in charge of setting up the treatment program testified that a contract for a treatment provider, if not already signed, would be signed in the very near future. J.A. 62-63. Some thirty days later, at a post trial hearing, another SRS official testified that no contract had been awarded but that treatment would be provided by SRS staff. J.A. 367.

[7] *Cf. O'Connor v. Donaldson*, 422 U.S. 563 (1975).

of interpersonal interaction is of hopefully a therapeutic or positive effect on the residents or patients. . . ." J.A. 407. He went on to state that by itself, "ward milieu" treatment is totally inadequate. J.A. 417. Dr. Befort concluded his testimony by telling the court, "In terms of needed treatment relevant to the sexual deviancy, that hasn't been delivered yet." J.A. 420. "Today it is still not available." J.A. 421. In the face of such evidence, the district court concluded that the allegation that *no treatment* was being provided to SVP Act committees was not true. J.A. 453, 454.

Decision of the Kansas Supreme Court

Respondent appealed the commitment. He argued that the Act, though labeled "civil" was punitive in purpose and effect and therefore violated the prohibition against double jeopardy and *ex post facto* laws. He also argued that he had been denied equal protection of the law because those committed under the SVP Act were subject to more onerous conditions, and greater difficulty of release, than persons committed under the State civil commitment laws. Respondent further asserted that the Act, by requiring indefinite incarceration of persons without a finding of both dangerousness and mental illness, violated substantive due process. Pet. App. 10a. The Kansas Supreme Court agreed that the Act violated substantive due process.[8]

[8] The State persists in labeling the majority opinion of the Kansas Supreme Court a plurality opinion. Justice Lockett, the member of the majority who wrote the joining concurrence, states very plainly, "In this opinion, I will set out my reasoning for joining Justice Allegrucci's majority opinion." 912 P.2d at 138, Pet. App. 21a. Further, a portion of the paragraph from Justice Lockett's opinion being quoted by the State on page 15 of its brief is omitted. That portion left out by the State reads, ". . . I must join the majority." 912 P.2d at 140, Pet. App. 24a.

The Kansas Supreme Court first determined:

> It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent." The legislature concedes that sexually violent predators are not amenable to treatment under K.S.A. 59-2901 *et seq.* [The act for the care and treatment of mentally ill persons.] If there is nothing to treat under K.S.A. 59-2901, then there is no mental illness. *In re the Care and Treatment of Hendricks,* 259 Kan. 246, 912 P.2d 129, 136 (1996), Pet. App. 16a.

The Court explained:

> We must determine if Hendricks is denied substantive due process based not on his lack of character but, rather, on the merits of his challenge. Mental illness is defined by K.S.A. 59-2902(h) as meaning any person who (1) [is] suffering from a severe mental disorder to the extent that such person is in need of treatment; (2) lacks capacity to make an informed decision concerning treatment; and (3) is likely to cause harm to self or others. Here, neither the language of the Act nor the State's evidence supports a finding that 'mental abnormality or personality disorder' as used in 59-29a02(a), is a 'mental illness' as defined in 59-2902(h). Absent such a finding, the Act does not satisfy the constitutional standard set out in *Addington* and *Foucha.* Justice White, speaking for the majority of the United States Supreme Court in *Foucha,* clearly stated that to indefinitely confine as dangerous one who has a personality disorder or antisocial personality but is not mentally ill is constitutionally impermissible. 504 U.S. at 78. Similarly, to indefinitely confine as dangerous one who has a mental abnormality is constitutionally impermissible.

> In addition, the State's own evidence is that Hendricks was being committed even though he does not suffer from mental illness. Hendricks is not mentally ill, and the criminal offenses for which he was imprisoned were not the result of mental illness. Therefore, as applied to Hendricks, the constitutionality of the Act depends upon a showing of dangerousness without a finding of mental illness. Clearly, the due process standard of *Addington* and *Foucha,* is not met by the Act as applied to Hendricks. We conclude that the Act violates Hendricks' substantive due process rights. 912 P. 2d at 138, Pet. App. 20a.

SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment has been recognized by this Court to include substantive limitations on the states. If this were not true, a state government could deprive its citizens of fundamental constitutional rights for insubstantial reasons, so long as it provided a hearing for individual adjudication. But even the most elaborate hearing, with what appear to be abundant procedural protections, cannot be allowed to mask the unconstitutionality of laws and actions that exceed the power of government over people. Similarly, the substantive component of Due Process jurisprudence can act as a check on state government when it purports to be acting in a constitutionally permissible fashion but is actually attempting surrepitiously to accomplish a purpose that is forbidden by direct constitutional prohibitions.

The State of Kansas wished to continue to incapacitate Mr. Hendricks and other persons targeted by the SVP Act, even though its authority to do so had expired at the end of their criminal sentences, because it feared that they might be prospectively dangerous if released. As was demonstrated in our earlier brief as Cross Petitioner, Kansas lacked the authority to extend the criminal because of the combined effect of the *ex post facto* and Double Jeopardy Clauses of the Constitution. Kansas law already provided

a remedy—its civil commitment statute—that would allow it to seek the confinement and treatment of individuals upon a showing that they were mentally ill and dangerous to themselves or to others. But the State was not satisfied with this as a remedy, because it would have required it to demonstrate that persons like Mr. Hendricks had a mental illness, which it could not.

Faced with this dilemma, the State concocted a new statutory scheme that had some of the appearances and used some of the language of a civil commitment statute, but which lacked the central core of a constitutionally legitimate commitment law: a required finding of mental illness and the promise of attempts to treat the illness. In their place, the new scheme required only a showing of something it called "mental abnormality", the principal component of which was that the individual must be shown to be the kind of person who engages in the very kind of criminal behavior that he had been punished for prior to the expiration of his sentence. In other words, motivated by its politically driven desire to continue the punishment and incapacitation of persons like Mr. Hendricks, and regretting the level of punishment it had prescribed for their crimes before they were committed, the legislature constructed an elaborate ruse.

The constitutionality of this statutory scheme will be measured by the substantive limitations imposed by the Due Process Clause.

The threshold question is the level of scrutiny to be employed. This Court has made clear that heigthened, rather than deferential, scrutiny is warranted when a law deprives an individual of a fundamental liberty interest. And there can be no doubt that a law that incarcerates an individual deprives him of the fundamental right to physical freedom. Since the law is subject to the skeptical test of heightened scrutiny, the State must demonstrtate a compelling state interest, and must show that no less drastic means could accomplish that interest.

A key feature of heightened scrutiny is that the Court evaluates the actual purpose of the legislation, and not a hypothesized or *post hoc* rationalization.

This Court has made clear that a state may not confine an individual under the guise of civil commitment unless it demonstrates that he is both mentally ill and dangerous. The Kansas legislature attempted to evade that clear requirement by claiming that it was incarcerating those who exhibited "mental abnormality". This attempted deception is transparent, and the State's definition of "mental abnormality" reveals that it is a circular description of people who commit certain crimes. The Kansas Supreme Court has authoritatively and correctly interpreted the SVP Act as requiring no finding of mental illness.

It has been suggested to this Court that even a commitment statute that requires no finding of mental illness and no provision of treatment must be approved because some mental patients may have received no treatment (at least as we understand that concept today) in the eighteenth and early nineteenth centuries. It is certainly true that our nation's traditions and history have provided guidance to this Court in interpreting the meaning of Due Process. But the more expansive suggestion that the mere fact that a practice may have some antecedents in our history automatically requires its approval as constitutional today is inconsistent with important decisions of this Court, both within the mental health area and beyond.

Stripped of both its historical camouflage and the disingenuous claim that it is merely a therapeutic endeavor designed to treat a condition that is sort of equivalent to true mental illness, the SVP Act is revealed for what it really is: an impermissible attempt to continue punishment past the expiration of an inmate's criminal sentence. This is not permitted by the Constitution.

ARGUMENT

I. THE KANSAS STATUTE VIOLATES THE SUBSTANTIVE PROTECTIONS OF THE DUE PROCESS CLAUSE.

It is well settled that the Due Process Clause of the Fourteenth Amendment imposes substantive, as well as more familiar procedural, limitations on state actions that impair the liberty interests of individuals. This Court has repeatedly observed that this "substantive component . . . bars certain arbitrary, wrongful government actions 'regardless of the procedures used to implement them.'" *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992), quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). This substantive protection is not an empty formality that a state can satisfy by mere recitation of a governmental purpose that is not illegitimate or with a routine and formulaic insistence on deference to state policy choices. Rather, the core of substantive due process in this Court's modern jurisprudence is that some limitations on individual liberty are beyond the state's authority even if it purports to accompany them with procedural mechanisms that appear to allow fair adjudication. In other words, if the state seeks to restrict individual liberty for a purpose that is beyond its constitutional power, no procedures, however elaborate or generous they might appear, will permit the state to evade that substantive limitation.

Legitimate contemporary concerns about appropriate judicial restraint, reinforced by the memory of excesses in the implementation of the doctrine in an earlier era, have led this Court to ration its implementation of substantive due process. The Court has made clear that it will not casually supplant a state's policy preferences with its own, but has also indicated that it will be more demanding when a state seeks to deprive citizens of the most important liberty interests. By the same token, the substantive protections of the Due Process Clause would be drained of all significance if a state could extinguish fundamental

liberties of individuals without adequate justification or if a state were allowed to accomplish constitutionally impermissible goals through a ruse of pretending to exercise constitutionally valid powers.[9] In these limited circumstances, the Court must more vigorously and skeptically examine the state's actions and its proffered justification.

A. Heightened Scrutiny Of A State's Justification Is Warranted When One Of Its Laws Deprives Individuals Of Their Fundamental Right To Physical Freedom.

Both historically and conceptually, physical freedom has always been recognized as central to our understanding of what liberty means. "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. at 80. Whatever else the drafters of the Due Process Clauses may have had in mind when they wrote the word "liberty," their contemplation surely included and, indeed, began with freedom from confinement. Reflecting this truism, this Court has taken great care not to "minimize the importance and fundamental nature of this right." *United States v. Salerno*, 481 U.S. 739, 750 (1987). "The institutionalization of an adult by the government triggers heightened, substan-

[9] In this case, the ruse may be further obfuscated by the appearance of procedural fairness. It is true that the procedural protections built into the Bail Reform Act, which weigh in the defendant's favor, were part of the Court's rationale in approving its system of pretrial detention in *United States v. Salerno*, 481 U.S. at 751. While on one side the SVP Act provides seemingly generous procedural protections, such as the allocation and magnitude of the burden of persuasion, on the other, it allows a prosecutor to force the respondent to take the stand and recount a history of decades old criminal behavior. Even without such a serious flaw, procedural protections will not save a statute that lacks a sufficient substantive rationale. The most elaborate procedures imaginable would be nothing more than a fig leaf if the state lacks the power to accomplish its substantive goal.

tive due process scrutiny," and the government interest justifying the deprivation of liberty must be "sufficiently compelling." *Reno v. Flores*, 507 U.S. 292, 316 (1993) (O'Connor, J., concurring). Therefore, when a state chooses to strip an adult of this most basic of freedoms, this core constitutional value would be imperiled if the Court's methodology were to acquiesce in the law's constitutionality with a minimum of scrutiny or the kind of deference this Court traditionally employs when reviewing legislation that does not implicate fundamental rights. *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

This Court has not fallen into that error. Instead, whenever a state's justification for depriving a citizen of physical liberty has been challenged, the Court has conducted its analysis through the lens traditionally described as heightened judicial scrutiny. In some of these cases, the Court has explicitly employed the language traditionally associated with "strict scrutiny." *See, e.g., United States v. Salerno*, 481 U.S. 739 (1987); *Foucha v. Louisiana*, 504 U.S. 71 (1992). In other cases, the Court has not chosen to use these particular catchphrases, but has, by the character of its holdings and reasoning, clearly signaled that it was requiring of the state substantially more than a minimal justification for confining individuals against their will.

A good illustration of this latter category of cases is *O'Connor v. Donaldson*, 422 U.S. 563 (1975), which, like *Foucha* and the instant case, involved state civil commitment laws. In *Donaldson*, the Court rejected Florida's claim that it could involuntarily confine nondangerous mental patients in a state hospital. The rationales for such confinement that were emphatically rejected by the Court are instructive about the level of "scrutiny" or "deference" that is appropriate for such cases. The Court first rhetorically inquired whether a state could "confine the mentally ill merely to ensure them a living standard superior

to that they enjoy in the private community?" 422 U.S. at 575. Justice Stewart's opinion responded unequivocally: "That the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution." *Id.* Thus the Court makes clear that providing help to the mentally ill is a legitimate state interest, but that the state cannot pursue that legitimate interest by depriving Ken Donaldson of his physical freedom. In a similarly rhetorical vein, the Court asked whether a state could "fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different?" *Id.* The Court's response is equally categorical: "One might as well ask if the State, to avoid unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." *Id.* Again, the rejected rationale is undoubtedly a legitimate state interest; states can implement the esthetic preferences of its citizens in such laws as zoning ordinances. *See generally Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). But such interests, while clearly legitimate, are just as clearly inadequate to justify the deprivation of an individual's right to physical liberty. The Court's approach in *Donaldson* reflects an intuitively obvious constitutional principle: taking away a person's physical freedom is constitutionally different in kind from providing care and assistance to willing recipients or restricting individual land use choices. The state must provide more than just a legitimate justification.[10]

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[10] This Court's opinion in *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed") is not inconsistent with this conclusion. While the Court used language traditionally associated with the "rational basis" test in striking down the

The importance of this principle is not diminished by the state's claim that it is legislating in the area of mental health. It is true that this Court has cautioned that judges should not casually overturn legislation and administrative decisions in the area of mental disability. *See generally Jones v. United States*, 463 U.S. 354, 370 (1983). But it is equally true that the commitment of an individual to a mental institution involves a "massive curtailment of liberty", *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *Vitek v. Jones*, 445 U.S. 480, 491 (1980), and that therefore the potential for state abuse of its authority is substantial. This Court has sought to balance these two concerns, on the one hand by avoiding judicial micromanagement of professional decisions, *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982),[11] and granting legislatures latitude to enact reasonable distinctions among classes of mental patients, *Jones v. United States, supra*, while on the other hand insisting that the state must have a purpose proportionate to the liberty loss it seeks to enact, *O'Connor v. Donaldson, supra*, and making sure that the state is not attempting to accomplish nontherapeutic purposes (such as incapacitation) under the guise of civil commitment, *Foucha v. Louisiana, supra*. By maintaining this balance, the Court has demonstrated that caution

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statute in question, the statute failed even this minimal test, and thus reference to more demanding scrutiny was unnecessary. This frequently quoted passage is therefore to be understood as an *a fortiori* statement.

By contrast, the Court did employ rational basis methodology to resolve the equal protection issue in *Heller v. Doe*, 509 U.S. 312, 319 (1993), but this was clearly because the issue of heightened scrutiny had not been argued below and therefore was not "properly" before this Court. *Id.*

[11] It is important to note that the *Youngberg* opinion's decision not to insist upon "compelling" state justification, 457 U.S. at 322, went only to the details of "those post-commitment interests cognizable as liberty interests under the Due Process Clause," 457 U.S. at 324. The case did not address the substantive justification for Nicholas Romeo's commitment under Pennsylvania law.

and prudence in addressing the ambiguities of mental disability are not inconsistent with rigorous enforcement of the substantive protections of liberty demanded by the Due Process Clause.[12]

B. The Kansas SVP Act Cannot Withstand Heightened Scrutiny.

Determining that a statute must be evaluated with heightened scrutiny does not, of course, end the constitutional inquiry.[13] The identification of this as the appropriate standard of review means, however, that the balancing of state and individual interests will proceed with a level of care reflective of the importance of the liberty interest at stake. Determining that an issue warrants heightened scrutiny, as contrasted to the deference exemplified by *Lee Optical*,[14] signals that there are substantial hurdles for a state to overcome in justifying its liberty deprivation.

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[12] Nor is there merit in Petitioner's professed concern that use of heightened scrutiny in cases involving deprivations of physical liberty would result in "chaos" in the review of "virtually all aspects of the States' criminal law and criminal justice systems, including the substance of state criminal offenses and the punishments authorized under statutes or sentencing guidelines." Pet. Br. at 25. This Court's opinions provide no basis for such anxiety. The Court has demonstrated no interest in interfering with ordinary sentencing practices through the employment of heightened scrutiny under the Due Process Clause. More significantly, the limitations on sentencing powers have traditionally been found in the Eighth Amendment's prohibition on cruel and unusual punishment, which has been interpreted to permit substantial flexibility in determining appropriate punishments. *See generally Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring).

[13] The Court has recently reminded us that even strict scrutiny involves a balancing of individual and governmental interests and need not be "fatal in fact." *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2117 (1995) (opinion of O'Connor, J.).

[14] In substantive due process cases, the Court appears not to have had occasion to employ the so-called middle tier of intermediate scrutiny that it has fashioned for some classifications in

Strict scrutiny analysis, which is also employed in some equal protection and First Amendment contexts, has three principal features that differentiate it from the ordinary rational basis inquiry that Petitioner has urged this Court to employ. First, the law must be in support of a compelling governmental interest. Second, the government must be unable to accomplish this purpose by means less restrictive of liberty than the law in question. The third feature that distinguishes heightened scrutiny from rationality review, and perhaps the most important for this case, is that the governmental purpose to be evaluated must be the state's actual reason for enacting the law. "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 116 S.Ct. 2264, 2275 (1996) (characterizing intermediate scrutiny). *See also Loving v. Virginia*, 388 U.S. 1, 11 (1967) (true purpose of antimiscegenation statute was "to maintain White Supremacy"); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (statute lacked secular purpose); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (racially discriminatory purpose inferred from pattern of enforcement);[15] *see generally* J. Morris Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 San Diego L. Rev. 953 (1978).

Applied to the facts of this case, this test would inquire whether Kansas had a compelling state interest in continuing to incarcerate Mr. Hendricks past the expiration of his sentence; whether that purpose could have been accomplished by less drastic means; and whether the real pur-

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equal protection analysis. *Cf. Craig v. Boren*, 429 U.S. 190 (1976); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). It does not appear that the differences between intermediate scrutiny and strict scrutiny would be relevant to this case.

[15] Sometimes even when the Court has not purported to impeach the state's announced purpose in a strict scrutiny case, it appears to have acted upon its skepticism through the enforcement of other requirements, such as the least drastic means test. *See Shelton v. Tucker*, 364 U.S. 479 (1960).

pose, to be evaluated in the other two prongs of the test, was, as the state asserts in this Court, to treat him for his "mental abnormality." Measured by these criteria, the Kansas SVP Act clearly violates the Due Process Clause.

1. *The State's legitimate interest in incapacitating Respondent expired when his criminal sentence expired.*

The State of Kansas had a legitimate interest in incarcerating Respondent in response to his criminal behavior. Under its power to punish crimes, it could justify this as a desire to rehabilitate Respondent, or as a retributive interest in exacting punishment, or a desire to incapacitate him from engaging in similar conduct in the future, or an amalgam of any or all of these reasons. The U.S. Constitution places few limits on the duration of incapacitation and punishment Kansas could have prescribed in its criminal statute for this type of conduct. *See Harmelin v. Michigan*, 501 U.S. 957 (1991). Even within the durational limits that the Kansas legislature had chosen to enact at the time of the offense, the State could have sought substantially longer incarceration. Instead of seeking conviction on all three counts, followed by a request for consecutive, enhanced sentences totaling 45 to 180 years, the State agreed to dismiss one count, to recommend an unenhanced sentence of 5 to 20 years on the remaining counts and to recommend that those sentences be served concurrently. Had the state sought longer incarceration as the prescribed penalty for Respondent's offenses, no constitutional issue would be presented. But the State chose not to do so, and Mr. Hendricks was incarcerated for the time prescribed in his sentence.

But Kansas has decided that, viewed in retrospect, the time prescribed in Mr. Hendricks' sentence was inadequate. In response, the legislature has prospectively enacted substantially longer sentences for those individuals

who commit such crimes in the future.[16] As discussed in our opening brief in this Court as Cross-Petitioner and in the *amicus curiae* brief of the National Association of Criminal Defense Lawyers (NACDL), the Constitution's prohibitions against *ex post facto* laws and double jeopardy prevented the state from openly extending Respondent's sentence.

Precluded from prolonging Respondent's incarceration directly, the State might have sought his confinement pursuant to its existing civil commitment laws. This Court has long held that the state has a constitutionally adequate justification for depriving an individual of his physical liberty if it commits him to receive treatment for a mental illness that renders him dangerous to himself or others. "The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." *Addington v. Texas*, 441 U.S. 418, 426 (1979).

But the Kansas legislature concluded that this option was not feasible and would not accomplish its incapacitative purpose since it would require proof that the individual to be committed had a mental illness which it could then endeavor to treat. The statement of legislative purpose admitted that those to be confined under the SVP Act were individuals "who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons . . . ." K.S.A. 59-29a01. The legislature then explicitly contrasted the persons it intended to confine from mental patients under its mental health civil commitment laws, noting that the former "generally have antisocial personality features which are unamenable to existing illness treatment modalities and those features render them likely to engage in sexually violent behavior." *Id.*

[16] Following Mr. Hendricks conviction, Kansas changed from indeterminate sentencing to guideline based determinate sentencing. The same legislature that passed the SVP Act enacted substantially longer determinate sentences.

The new enactment under which Respondent is confined carefully avoids any requirement that the state demonstrate that the individual to be committed has a mental illness, and the legislature has acknowledged that the reason is that it wants to reach individuals who do not have a "mental disease or defect." In its place, the statute requires only a showing of either a "personality disorder" or a "mental abnormality." KSA 59-29a02(a). The legislative definition of "mental abnormality", which is not a term employed by clinicians to describe psychological pathologies, is particularly artful: " 'Mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." KSA 59-29a02(b). A careful examination of this definition clearly reveals the legislature's purpose. The condition must either have been present from birth or have been acquired at some time subsequently. The motivation to commit the crimes can either be emotional (feeling like committing the crimes), or volitional (failing to prevent oneself from committing the crimes). The term "mental abnormality" itself connotes no further limitations: since very few people have the desire to commit these crimes, those who have such desires are by any linguistic construction "atypical" or "abnormal." Reduced to its essentials, the definition of "mental abnormality" means "individuals who like to commit these crimes, or who at least do not refrain from committing them." [17]

[17] Petitioner and *amici* Menninger Foundation, American Alliance for Rights Responsibilities, et al. warn that there is no definition of mental illness in the Constitution and that this Court should not

Neither pseudoclinical terminology nor after-invented rationalizations [18] can disguise the fact that the legislature enacted this statute not *despite* the fact that the affected individuals might not have a mental illness, but rather *because* they have no mental illness. The goal of the statute is not treatment of a mental condition, it is incapacitation. The facade of psychological-sounding language has been erected in an attempt to mask the constitutional impermissibility of the law's true purpose: extending incarceration beyond the expiration of the individual's sentence.

The Kansas Supreme Court has rendered an authoritative interpretation of the meaning of this statute. "We find no support in the Act that a finding of mental illness is required." *In re Care and Treatment of Hendricks*, 912 P.2d at 137, Pet. App. 18a. Not only is this finding binding on this Court under its own rules and precedents, *see, e.g., R.A.V. v. St. Paul*, 505 U.S. 377, 381 (1992), but

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enshrine our current understanding of mental illness for all time. Similarly, there may be concern that Respondent's position would require the Court to read the contents of the American Psychiatric Association's DSM-IV as having constitutional proportions. But this case does not require the Court to determine the precise contours of which state definitions of mental illness would pass muster and which would not. All that is required in this case is a finding that when a state makes no requirement of mental illness, or attempts to disguise its lack of a mental illness requirement with mumbo-jumbo like "mental abnormality," it violates the restrictions announced in *Foucha*.

[18] *See, e.g.*, Brief of *Amici Curiae* Menninger Foundation, et al. *Amici* also seek to persuade this Court, citing references that are outside the Record of this case, that sexual psychopathy is now amenable to newly devised forms of treatment. *Amici* might have been better advised to attempt to persuade Kansas legislators of this optimistic approach to treatment, which the legislature clearly did not share, and which cannot be used now to buttress the statute's constitutionality as a *post hoc* rationale. *See United States v. Virginia*, 116 S.Ct. at 2275.

it is also logically compelled by the language in the text of the statute and by the history that led to its enactment.[19]

But it might be asked whether this elaborate ruse of pretending to require some "substitute" for mental illness was necessary. Why shouldn't the state be allowed to commit individuals it deems prospectively dangerous without any connection to mental illness? Why isn't it enough that the state's "interest in preventing crime . . . is both legitimate and compelling"? *United States v. Salerno*, 481 U.S. at 749. The simplest answer is that this issue was resolved by this Court in *Foucha*. One of the reasons given for rejecting Louisiana's scheme for committing insanity acquittees who were no longer mentally ill is that it would "be only a step away from substituting confinement for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness," 504 U.S. at 83, permits incarceration only of persons who are subject to criminal punishment. Indeed, one of the strongest reasons for the Court's rejection of Louisiana's proffered justification that dangerousness alone should suffice as a predicate for commitment is that "[t]he same would be true of any convicted criminal, even though he has completed his prision term." 504 U.S. at 82-83. This anticipates Respondent's situation with precision.[20]

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[19] The Kansas Supreme Court did not arrive at this interpretation casually. It began by noting that "we must presume the Act is constitutional and resolve all doubts in favor of the Act's validity. *If there is any way to construe the Act as constitutionally valid we must do so.*" 912 P.2d at 133, Pet. App. 10a (emphasis supplied). It could be argued that such a heavy presumption of constitutionality is inappropriate in strict scrutiny analysis, where the state is sometimes said to be required to overcome a presumption of invalidity. But the Kansas Supreme Court's statement of its approach and attitude clearly bespeak great care in considering whether an alternative interpretation of the legislative enactment might be possible.

[20] There are obvious differences between this Kansas statute and the Louisiana statute in *Foucha*, particularly with regard to the

But rejection of the notion of commitment on predictions of dangerousness alone does not depend solely on *stare decisis*. As several members of this Court have observed, divorcing the power to commit from any nexus to mental illness and treatment would invite the states to create an alternative system parallel to the criminal justice system that would lock people away on the basis of our fears of crimes they might someday commit. Such a shift away from the traditional requirements of our system of criminal justice is fraught with perils and potential for abuse, and should not be undertaken lightly.

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burden of persuasion. But at their core, the cases are really more similar than different. Each involves a legislature that seeks to civilly confine individuals who are not mentally ill because it cannot confine them under its ordinary criminal authority, in *Foucha* because they were acquitted, and in *Hendricks* because they were convicted, punished, and cannot be punished for the same offense again because of double jeopardy. Each statute is a ruse that attempts to accomplish what is in reality a punitive goal under the guise of civil commitment.

But there is also a substantial practical difference. Louisiana had relatively few options to protect its citizens from the future dangerousness of people like Terry Foucha: arguably, they could abolish the insanity defense, although there may be some doubt about whether that course of action would survive review under the state or Federal constitution. Short of that there is little they could do to incapacitate those whom it can never convict. By contrast, Kansas has an abundance of options: the legislature could enact longer sentences, they could enact indeterminate sentences in which eligibilty for release depends on persuading the parole board that inmates are not prospectively dangerous, etc. The one thing they cannot do is re-rig the rules of the game after the fact. To use a simple example that illustrates the limitations imposed by the double jeopardy clause, a state has the option of punishing a particular offense with a sentence of twenty years; but it cannot set the punishment at ten years and later decide that was not long enough, and therefore extend expiring sentences for another ten years. *See amicus curiae* brief of the National Association of Criminal Defense Lawyers.

2. Historical practices are not the sole determinant of the scope of the substantive meaning of the Due Process Clause.

It has been suggested to this Court that the constitutionality of committing people thought to be prospectively dangerous who are not mentally ill can be ratified without weighing the individual's interests against society's interests under strict scrutiny. The Menninger Foundation et al., in their *amici curiae* brief, recount in great detail their version of the history of preventive confinement, with particular emphasis on what they see as historical instances of custodial confinement without treatment, particularly in the colonial period and early nineteenth century. While the details of this history and the interpretations drawn by *amici* could be debated,[21] the more important point is that the argument misperceives the role of history in this Court's due process cases.

This Court has repeatedly discussed the relevance of historical practices and understanding to its interpretation of the Due Process Clauses of the Fifth and Fourteenth Amendments, but it has done so in contexts more limited and sharply focused than *amici* suggest. The first context in which the Court looks to history for guidance is to determine, under *procedural* due process, when a procedure

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[21] For example, the emphasis on the primitive practices and understanding of the colonial and very early national period is of questionable relevance. The focus on treatment of persons with chronic mental illness, while still far short of today's standards, had become more widely accepted by the time of the ratification of the Fourteenth Amendment. *See, e.g.*, Norman Dain, *Concepts of Insanity in the United States, 1789-1865* 194-95 (1964); Gerald N. Grob, *The Mad Among Us: A History of the Care of America's Mentally Ill* 109-16 (1994). When this Court looks to history for guidance in examining constitutional questions, it has emphasized the importance of taking care to focus on the relevant period in our history rather than broader generalizations. *See, e.g., Markman v. Westview Instruments, Inc.*, 116 S.Ct. 1384, 1390-95 (1996).

in a criminal trial violates due process if that procedure is not addressed by the more specific provisions of the Bill of Rights. This line of cases holds that since most procedural issues in criminal trials are governed by particular prohibitions of the first eight amendments, the more generally worded due process clause has a limited role to play in restricting the ability of states to dictate the shape of their criminal trials. First announced in *Patterson v. New York*, 432 U.S. 197, 202 (1977), the doctrine holds that procedural innovations by the states will be deemed presumptively valid unless they violate some principle "so rooted in the traditions and conscience of our people as to be ranked fundamental." *See also Medina v. California*, 505 U.S. 437, 445 (1992); *Montana v. Egelhoff*, 116 S.Ct. 2013, 2015 (1996) (plurality opinion); *Cooper v. Oklahoma*, 116 S.Ct. 1373, 1380 (1996) (finding an appropriate role both for historical antecedents and for contemporary evaluation of fairness). This resort to history is specifically driven by the presence of other criminal procedural protections in the Constitution, and thus has no particular relevance to the proper adjudication of cases under substantive due process.

The other principal use of history in this Court's due process jurisprudence does involve the substantive meaning of the clauses, but does so within a more restricted scope. As noted in section A, *supra*, an early step in strict scrutiny analysis under substantive due process is the determination of whether the right infringed is a "fundamental" liberty interest. Before deciding whether the right is fundamental, however, it is necessary to determine what the "right" is. There have been suggestions in some of this Court's opinions that the appropriate methodology is to craft the narrowest possible description of the liberty interest involved and then to decide whether that interest, so characterized, would have been deemed fundamental over the course of American history. *See, e.g., Michael H. v. Gerald D.*, 49 U.S. 110, 127-28 n.6 (1989) (plurality

opinion). Other members of the Court expressed discomfort with the narrowness of this historical inquiry because it coud imperil cases like *Loving v. Virginia*, 388 U.S. at 12, if the right were narrowly described as "the right to marry a person of another race" rather than "the right to select a marriage partner." *See Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring in part).

Similar anomalies could arise in this case if the historical inquiry were given too narrow and specific a focus. We believe that the appropriate formulation of the liberty interest is the right to be free from incarceration, and we believe that the Court was correct in using that formulation in determining the right to be fundamental in cases like *Salerno* and *Foucha*. The Menninger *amici* brief seems to suggest that the appropriate characterization is something like "the right not to be civilly confined as a sexual psychopath without effective treatment," and concludes that since instances of such confinement can be found in American history, the right cannot be deemed fundamental today, and therefore rational basis is the appropriate test in measuring the Act's modern constitutionality. If this were the appropriate line of analysis, states might be free to re-enact long discredited practices that would be insulated from careful judicial scrutiny solely because of their supposed historical pedigree. For example, the Menninger brief itself notes "the widespread acceptance of phrenology" at earlier times in our nation's history, Brief *Amici Curiae* of Menninger Foundation et al. at 10, and the early belief that "moral insanity" was separate and distinct from other forms of mental illness. *Id.* Surely any state that chose to re-enact a modernized version of any such notion today would not be protected from heightened judicial scrutiny by the practices' historical antecedents. If history were deemed to have that tight a stranglehold on this Court's implementation of the substantive protections of Due Process, *O'Connor v. Donaldson*, among other cases, would appear to be wrongly

decided on that ground alone. Such a narrow approach, requiring that a challenger demonstrate that a practice has been universally condemned throughout our history, cannot be reconciled with this Court's due process jurisprudence.

Without historical support for its provisions or anything other than a disingenuous claim that it is designed to treat a condition that is no more than a description of certain criminal acts that is sort of equivalent to a true mental illness, the SVP Act is revealed for what it really is: an impermissible attempt to extend punishment beyond the expiration of a person's criminal sentence. This is not permitted by the Constitution.

CONCLUSION

Mr. Hendricks requests that the Court affirm the judgment of the Kansas Supreme Court.

Respectfully submitted,

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STATE OF KANSAS,

Petitioner,

v.

LEROY HENDRICKS,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Kansas

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ARGUMENT

I. THE CONSTITUTION PERMITS THE STATES TO LEGISLATE REASONABLE CRITERIA FOR CIVIL COMMITMENT OF PERSONS WITH MENTAL DISORDERS, WITHOUT LIMITATION TO ANY CLINICAL DEFINITION OF "MENTAL ILLNESS."

The parties' briefs demonstrate a sharp difference of opinion as to how this Court should approach the resolution of the fundamental substantive due process questions raised in this case. The State's primary argument is that decisions regarding the mental conditions sufficient to justify involuntary civil commitment should largely be left – as they historically have been – in the hands of the state legislatures, with limited but meaningful federal judicial oversight to ensure that the choices the States make are reasonable. This approach is consistent with the numerous decisions of this Court cited in the State's opening brief, *see* Brief of Petitioner (No. 95-1649) at 20-33, including cases that recognize historical deference to the States in such matters, *id.* at 20-30, and cases that urge deference in light of the uncertain state of medical knowledge in matters involving the diagnosis and treatment of mental conditions. *Id.* at 29.

Hendricks offers a very different view, arguing that because his liberty is affected by the choices the State has made, the Kansas Sexually Violent Predator Act ("the Act") must be subjected to the most rigorous judicial scrutiny. *See* Brief for Respondent (No. 95-1649) at 12-15. He further contends, with the support of *amici* such as the American Psychiatric Association ("APA"), that the Constitution prohibits the States from involuntarily committing for care and treatment any person who is not

"mentally ill" in some narrow clinical sense of that term. Hendricks does not, however, specify how that proposed term of art is to be defined, except to suggest – as did the Kansas Supreme Court, Pet. App. 17a, 19a – that it is limited to whatever conditions would have permitted involuntary commitment under Kansas' traditional civil commitment statute, Kan. Stat. Ann. § 59-2901 *et seq.* *See* Brief for Respondent (No. 95-1649) at 19-21. Hendricks does not explain why the definition the Kansas Legislature previously drafted in that statute should constitutionally trump the additional definition the Kansas Legislature provided in the present Sexually Violent Predator Act.

Several *amici* proffer various thoughts on the subject, the common thread of which is that the only constitutionally sufficient "mental illness" is that which one or another group of clinicians deems sufficiently debilitating.[1] Their suggestions, taken together with Hendricks'

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[1] The APA brief suggests that the essential test of "mental illness" is whether the person to be committed "lack[s] rational capacity to make his own treatment decisions" or whether commitment would be otherwise "in the individual's interest," arguing that "confinement based on 'mental illness' must rest on the State's *parens patriae* power to override the individual's autonomy to act for his own good." Brief for the American Psychiatric Association at 21. Elsewhere, the APA suggests there must be an "impairment of cognitive abilities" sufficient to support an insanity defense to a criminal charge. *Id.* at 26-27. Apparently society's interest in protecting potential victims likely to be harmed as the result of a predator's mental condition has no substantial weight in the APA's opinion. The Brief of the American Civil Liberties Union *et al.* recognizes (at 16) that "this Court has not rushed to define with specificity the precise contours of [the "mental illness"] due process limitation" and agrees (at 17) that "[t]he definition of mental illness is a legal question, not purely a medical one," but goes on (at 17) to posit a core requirement "that the individual involved suffers from a significant impairment in his or her ability to reason." The Brief for the National Mental Health Association offers (at 7) the *ipse dixit* that "[t]he term 'mental illness' is reserved for psychological conditions that impair virtually every aspect of the lives of people it affects. It does not apply to those who merely cannot resist deviant sexual urges. . . . " The brief of the Washington State Psychiatric Association contends (at 5, 7) that "a person must be suffering from a serious cognitive, perceptual or affective dysfunction which significantly impairs that person's ability to function in ordinary life."

failure to propose any rational criteria, serve only to confirm what the State's opening brief shows: that the purportedly magical term "mental illness" has no single accepted meaning either in medicine or in constitutional jurisprudence. *See* Brief of Petitioner (No. 95-1649) at 39-42; *see also* briefs of *amici curiae* Menninger Foundation *et al.* (at 22-25) and States of Washington *et al.* (at 8-16). Surely neither Hendricks nor his *amici* are contending that the mere presence or absence of the phrase "mental illness" in the Act has any constitutional significance. *Cf. Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934) ("A fertile source of perversion in constitutional theory is the tyranny of labels.").[2] Thus, they offer no rational alternative

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[2] Like the similar argument in his opening brief in No. 95-9075, Hendricks' argument that this Court is bound by the Kansas Supreme Court's conclusion that the Act does not require "mental illness" (Brief for Respondent at 20-21) is unfounded. That conclusion was merely an element of the Kansas Supreme Court's interpretation of what it perceived to be a federal substantive due process requirement imposed by *Foucha v. Louisiana*, 504 U.S. 71 (1992). The Kansas Supreme Court was not interpreting the scope of the Kansas Act as a

to a standard of review that accords respect to the States' legislative judgments regarding appropriate substantive criteria. Indeed, that standard of review already has been established by this Court's decisions allowing the States reasonable discretion in this difficult area.

A. This Court's Precedents Properly Allow The States Reasonable Discretion To Utilize Involuntary Civil Commitment As A Means Of Dealing With Sex Offenders Who Suffer From Identifiable Mental Conditions.

As clearly demonstrated in the State's opening brief, this Court's precedents repeatedly have taken a deferential approach to evaluating the constitutionality of substantive standards for involuntary civil commitment. *See* Brief of Petitioner (No. 95-1649) at 20-33. For example, in *Jackson v. Indiana*, 406 U.S. 715 (1972), which Hendricks barely addresses, *see* Brief for Respondent (No. 95-1649) at 14 n. 10, this Court recognized that "States have traditionally exercised broad power to commit persons found to be mentally ill." 406 U.S. at 736. The Court held in that case that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* at 738. Clearly, the most logical reading of *Jackson* is that the

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matter of Kansas law, and therefore its conclusion deserves no deference in this Court's determination whether the clear provisions of that Act are valid under the United States Constitution. *See* Brief of Cross-Respondent (No. 95-9075) at 21-22.

Court adopted a deferential level of review in this context.[3]

More recently, in *Reno v. Flores*, 507 U.S. 292 (1993), the Court rejected a substantive due process challenge to the federal government's continued detention of deportable juvenile aliens in custodial institutions rather than releasing them to the custody of responsible adults. In rejecting the challenge, the Court declared that "where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution." *Id.* at 303. Rather, the Court concluded that the decision to detain such persons in custodial institutions "is rationally connected to a governmental interest in 'preserving and promoting the welfare of the child.' " *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).[4]

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[3] In arguing that there is no basis for anxiety over a conclusion that heightened scrutiny applies to the substance of state civil commitment systems, *see* Brief for Respondent at 15 n. 12, Hendricks ignores that this Court always has accorded considerable deference to the States' choices regarding the substance of their criminal laws, an analogy that has obvious force in this context. *See, e.g., Montana v. Egelhoff*, 116 S. Ct. 2013, 2024 (1996) ("States enjoy wide latitude in defining the elements of criminal offenses. . . . ") (Ginsburg, J., concurring).

[4] Later in the opinion, the Court specifically observed that "the regulation [at issue] involves no deprivation of a 'fundamental' right. . . . " 507 U.S. at 311. The State recognizes that two Justices expressed the opinion in *Flores* that the "institutionalization of an adult by the government triggers heightened, substantive due process scrutiny." *Id.* at 316 (O'Connor, J., concurring, joined by Souter, J.). Even those Justices, however, did not contend that strict scrutiny would apply in such a case; instead they declared that the State must

Certainly, it is not true that the Court has uniformly subjected *every* restriction on individual liberty interests to the most exacting scrutiny.[5]

B. The Commitment Criteria The Kansas Sexually Violent Predator Act Specifies Are Clinically Meaningful And Can Readily Be Applied By Mental Health Professionals.

The *amicus* briefs filed in this case demonstrate significant differences of opinion among medical experts as to the existence of diagnosable proclivities to sexual violence and the susceptibility of such conditions to treatment. To be sure, the Brief for the APA opines (at 18-19) that psychiatrists cannot reliably predict the future dangerousness of sex predators and (at 28-30) that there is insufficient evidence that the mental conditions making

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have "a 'sufficiently compelling' governmental interest to justify such action." *Id.*

[5] Hendricks asserts that the State is arguing for the minimal scrutiny of cases such as *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). *See* Brief for Respondent at 13, 16. To the contrary, the State has carefully articulated the standard as one of "reasonableness," a concept that may differ from rational basis review by providing the Court with more authority to evaluate the nature of and actual basis for particular legislative judgments in cases involving important liberty interests. *See, e.g.*, John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 392 (5th ed. 1995); *see also id.* at 384 (noting the uncertainty regarding the Court's level of review generally in substantive due process cases). In any event, Hendricks certainly is correct that the State has taken the position that the level of review is less than strict scrutiny, although the Act also passes constitutional muster under that more exacting standard.

future predation likely can be treated successfully. Here, as in previous cases, however, the views of that organization are not conclusive in light of the sharply conflicting views of other professionals, as reflected in the briefs of other *amici*. *Cf. Barefoot v. Estelle*, 463 U.S. 880, 899 (1983) (declining to be guided by APA brief's assertion that dangerousness was not reliably predictable, noting that "[t]he *amicus* does not suggest that there are not other views held by members of the Association or of the profession generally," and declaring that the Court was not "convinced . . . the view of the APA should be converted into a constitutional rule"); *Estelle v. Smith*, 451 U.S. 454, 472-73 (1981) (same).[6]

The *amicus* Menninger Foundation – a nationally recognized private psychiatric institution – observes that many psychiatrists believe that the future dangerousness of those suffering from some mental conditions can be adequately ascertained, *see* Brief of the Menninger Foundation *et al.* at 16-18, and that there are medically recognized treatments for sex offenders such as Hendricks. *Id.* at 26-29. Similarly, the *amicus* brief filed by the Association for the Treatment of Sexual Abusers – an international organization composed of mental health professionals each of whom has engaged in at least 2000 hours of evaluating and treating sex offenders – explains (1) that mental health professionals can understand, apply and give meaning to legal concepts such as "mental

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[6] Much of the APA's brief is devoted to recasting legal arguments that it made – but this Court correctly rejected – in *Allen v. Illinois*, 478 U.S. 364 (1986).

abnormality" and "mental illness," *see* Brief of the Association for the Treatment of Sexual Abusers at 3-9, (2) that the definition of "mental abnormality" in the Kansas Act is consistent with professional diagnostic processes, *id.* at 10-11, and (3) that sex offenders can be treated, *id.* at 11-12.

This Court previously has rejected the argument that "power to legislate in this area depends on the research conducted by the psychiatric community. . . . The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments." *Jones v. United States*, 463 U.S. 354, 365 n. 13 (1983); *cf.* Henry Weihofen, *The Definition of Mental Illness*, 21 Ohio St. L.J. 1, 12 (1960) ("where the legal rule concerns mentally disordered persons, any answer should accord with current psychiatric knowledge. . . . But the ultimate decision is not merely a psychiatric one. It is a major policy decision."). Surely, given the medical and scientific authorities offered in support of the Kansas Act in this case, the substance of the Kansas Act embodies a "reasonable legislative judgment" regarding the mental conditions sufficient to require the involuntary care and treatment of some who present a continuing danger to the community.

There is a constitutional tradition of permitting the States considerable discretion in creating and implementing the substance of involuntary civil commitment systems. This Court has expressly recognized that tradition, declaring that "[t]he States have traditionally exercised broad power to commit persons found to be mentally ill," and accepting the fact that "[t]he substantive limitations

on the exercise of this power and the procedures for invoking it vary drastically among the States." *Jackson v. Indiana*, 406 U.S. 715, 736-37 (1972). The correctness of that observation is further detailed and supported by the sources cited in the Brief of Cross-Respondent (No. 95-9075) at 17-18. *See also* Brief of the Menninger Foundation *et al.* at 5-14 (reviewing historical evidence of the bases for civil commitment). It is Hendricks, not the State of Kansas, who is inviting this Court to break new constitutional ground and in so doing usher in an era of intrusive federal judicial review of mental health matters for which the States traditionally have been responsible.

It is important to note – as Hendricks and his *amici* do not – that the framework in which the "mental illness" issue arises in this case is quite different in kind from that discussed in *Foucha v. Louisiana*, 504 U.S. 71 (1992). The discussion of "mental illness" there arose in the context of an acquittal by reason of insanity on charges of burglary and unlawful use of a firearm. Moreover, the "dangerousness" issue related to predicting whether Foucha might in the future commit crimes of *any* nature. *See* 504 U.S. at 75, 82. The commission of burglary and firearms offenses is not generally viewed as necessarily reflecting the presence of any mental disturbance. Indeed, individuals who commit such crimes commonly are sane in both clinical and ordinary usage and do so for entirely rational reasons. In contrast, a legislature reasonably can view sexual predation – such as Hendricks' decades of preying upon children of varying ages and either gender – as potentially reflecting a disturbed mental condition which, if it persists, is likely to lead to irrational and irresistible urges to harm additional victims in the same manner.

Moreover, there is nothing "circular" about examining past conduct as part of a professional determination whether such a mental condition is present. *See* Brief of the Association for the Treatment of Sexual Abusers at 10-11. In short, statutes such as the Kansas Act deal with mental health issues that are unique to this particularly sensitive and difficult area of human behavior, and the States' approaches to those issues should not be constrained by mechanical extrapolation of language and analysis used in the very different context that *Foucha* presented.[7]

II. HENDRICKS' REPEATED COMPLAINTS ABOUT HIS CARE AND TREATMENT PROGRAM ARE IRRELEVANT TO THE ISSUES BEFORE THIS COURT.

As in his opening brief in No. 95-9075, Hendricks persists in arguing that the Act is unconstitutional – apparently on its face – because the State allegedly has not implemented a treatment program to his satisfaction. *See* Brief for Respondent (No. 95-1649) at 5-7. The problems with this argument are manifest.

First, as explained fully in the State's opening and responsive briefs, the Act specifically requires the provision of care and treatment. The appropriate way to challenge the implementation of the Act in this respect is to

[7] As noted in the Brief of Petitioner (No. 95-1649) at 35, this Court had no occasion to define the term "mental illness" in *Foucha* because Louisiana conceded the absence of any continuing mental illness.

litigate the adequacy of the treatment program in a separate proceeding. This Court has made clear that questions of implementation generally provide no basis for invalidating a statute on its face. *See, e.g., Reno v. Flores*, 507 U.S. 292, 301 (1993). Second, Hendricks twice has raised this very argument before Kansas trial courts, twice had the opportunity to present evidence and argument regarding the treatment program, and twice had his claims expressly and specifically rejected by the trial courts. *See* Brief of Cross-Respondent (No. 95-9075) at 23-28; *see also* Brief of Petitioner (No. 95-1649) at 42-44. Third, this Court has "avoided ruling on whether involuntarily committed persons have a constitutionally protected right to minimally adequate rehabilitative treatment." John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 522-23 (5th ed. 1995) (footnote omitted). Thus, this Court has never decided whether Hendricks even has the constitutional right to treatment which he apparently now claims. And certainly Hendricks did not seek review of this issue in his conditional cross-petition, nor is it fairly encompassed by any of the issues the parties have raised.

* * *

The essence of the arguments of Hendricks and his *amici* is that the States' only constitutional option is to sentence repeat sex offenders to life imprisonment without parole. Even the option of forgoing criminal punishment altogether in favor of involuntary civil commitment for long-term care and treatment, as under the Illinois statute at issue in *Allen v. Illinois*, would not be available. That is because, in the view of Hendricks and some of his *amici*, virtually no sex offenders suffer from the kind of

"mental illness" that they contend is a constitutional prerequisite to *any* civil commitment. Never do Hendricks and his *amici* address, however, why life imprisonment without parole would be in the best interest of repeat sex offenders who suffer from significant abnormal mental conditions. Surely, in the circumstances presented here, it is both reasonable and humane for the State to choose an option less harsh than life imprisonment without parole.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth more fully in the Petitioner State of Kansas' opening brief in No. 95-1649 and its responsive brief in No. 95-9075, the State respectfully requests that this Court hold that the Kansas Sexually Violent Predator Act is constitutional.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF KANSAS,
Petitioner and Cross Respondent

v.

LEROY HENDRICKS,
Respondent and Cross Petitioner

On Writ of Certiorari to the Supreme Court of Kansas

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SUMMARY OF THE ARGUMENT

This Court has taken care to prevent States from "substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who have proved beyond reasonable doubt to have violated the criminal law." *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992). Mr. Hendricks committed criminal acts in 1984 for which he was rightly criminally responsible and for which he was punished. Because, as the State recognizes, it cannot now increase his criminal sentence beyond what the prosecutor agreed to and the court imposed, the State seeks to recast additional criminal punishment in the form of "civil" commitment. Unlike the civil commitment of the mentally ill this Court upheld in *Addington v. Texas*, 441 U.S. 418 (1979), commitment of persons with unspecified "mental abnormalities" for the protection of the community is not an exercise of the State's *parens patriae* authority to provide care and treatment to its citizens. For the same reasons that the Due Process Clause requires this Court to prevent unbridled "confinements for dangerousness" from displacing the criminal law as the ordinary mechanism for depriving persons of their liberty for the protection of society, this Court has recognized that "civil" labels cannot be used to circumvent specific constitutional safeguards, such as the *ex post facto* and double jeopardy prohibitions against increasing Mr. Hendricks' punishment.

Like the juvenile delinquency prosecutions involved in *Breed v. Jones*, 421 U.S. 519, 529 (1975), the consequences of commitment as a sexually violent predator under Kansas law "include both the stigma inherent in such a determination and the deprivation of liberty for many years." Kansas single-mindedly relies on this Court's decision in *Allen v. Illinois*, 478 U.S. 364 (1986), as authority for the proposition that "state statutes which provide for the civil commitment of sexually dangerous persons with mental conditions for long-term care and treatment are not criminal in nature and do not impose

'punishment' for constitutional purposes." Br. Cross-Resp. at 5. But *Allen* is not so sweeping. Under Illinois law, the State had to forego criminal prosecution in order to commit a sexually dangerous person for treatment, even though it was required to prove a crime beyond a reasonable doubt, so there was no danger that commitment would be used to circumvent constitutional restrictions on criminal prosecution and punishment. The Illinois commitment statute provided a benign alternative to the rigors of criminal sentencing for persons, like Allen, who suffered from mental illness and could benefit from treatment. Kansas barely acknowledges the difference between a statute permitting commitment instead of prosecution, and one designed to extend a sentenced prisoner's confinement like the Kansas SVP Act. Unlike Illinois, Kansas has not "disavowed punishment," and this case cannot be analyzed as if it were the twin of *Allen*.

Kansas agrees with Cross-Petitioner that the Court has customarily looked to the purpose or the effect of a sanction to determine whether a nominally "civil" sanction should be treated as criminal punishment (Br. Cross-Resp. at 15), and makes reference to the factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) in assessing whether a statute as a punitive purpose or effect. (Br. Cross-Resp. at 17). Yet rather than attempting to apply these standards, the State retreats behind slogans of deference to state policy choices. This case is not about whether the State has a legitimate interest in protecting the community from potentially dangerous sex offenders, but whether the State can effectuate that interest by imposing additional confinement on persons the State has held criminally accountable and desires to punish. The seven factors listed in *Kennedy v. Mendoza-Martinez* can fairly be distilled into three inquiries: (1) is the sanction one historically used to punish; (2) is the factual predicate for the sanction the commission of a crime; and (3) is the legislature's predominant goal a civil or remedial purpose. The design and implementation of the Kansas SVP Act offer the "clearest proof"

that commitments were intended to be punishment in disguise. Confinement in a prison facility is historically used to punish, and commitment as a sexually violent predator is tied to proof that the person has committed a crime, a condition the Court has long deemed, "significant of penal and prohibitory intent." *Montana Department of Revenue v. Kurth Ranch*, 114 S.Ct. 1937, 1947 (1994). And, no matter how hard the State tries to avoid it, the Kansas Supreme Court's finding that incapacitation, not treatment, was the predominant purpose of the commitment statute is amply supported by the record and entitled to deference. This Court's decisions upholding civil regulatory detention schemes have always involved detention associated with special governmental functions that do not—as the Kansas SVP Act would do —have the potential to displace the criminal law.

ARGUMENT

I. *ALLEN v. ILLINOIS* IS NOT CONTROLLING BECAUSE KANSAS, UNLIKE ILLINOIS, SEEKS TO IMPOSE CONFINEMENT OF SEX OFFENDERS IN ADDITION TO, RATHER THAN INSTEAD OF CRIMINAL PROSECUTION.

Kansas relies almost exclusively on this Court's decision in *Allen v. Illinois*, 478 U.S. 364 (1986), for its analysis of the *ex post facto* and double jeopardy issues presented in the cross petition. But *Allen* does not, as the State would have it, hold *all* "laws providing for the involuntary commitment of sexually dangerous persons are civil in nature." Br. Cross-Resp. at 6. In making that generalization, the State ignores the basic distinction recognized by this Court in *Specht v. Patterson*, 386 U.S. 605, 610 n.7 (1967), between the alternative to criminal prosecution provided by statutes like that examined in *Allen* and the Minnesota statute in *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1939), and those, like the Colorado law at issue in *Specht*, that are used as a form of disposition following a criminal prosecution and conviction. Kansas ignores the Court's rea-

sons for holding the commitment procedure in *Allen* civil for purposes of the Self-Incrimination Clause of the Fifth Amendment: Illinois "disavowed any interest in punishment, provided for treatment of those it commits and established a system under which committed persons can be released after the briefest time in confinement." 478 U.S. at 370. Because none of these things are true of the commitment scheme established by the 1994 Kansas Sexually Violent Predator Act, the Court's holding in *Allen* does not fit this case, and its reasoning, in *Allen* as well as many other cases in which the Court has attempted to differentiate civil from criminal proceedings, leads to the conclusion that commitments under the Kansas statute are criminal, and that Mr. Hendricks' commitment violates the *ex post facto* and double jeopardy clauses.

A. Kansas has not "disavowed any interest in punishment."

Under Illinois law, the prosecutor had the choice to seek a conviction and sentence on criminal charges, or to seek commitment under the Sexually Dangerous Persons Act. Because the prosecutor could not do both, there was no danger, as there is under Kansas law, that commitment could be used to extend the confinement of a sentenced prisoner, or that treatment in a hospital setting would be delayed for years by a period of prison confinement. Illinois, quite literally, disavowed the right to punish those persons it subjected to commitment as Sexually Dangerous Persons. Because only persons who had already been charged with criminal offenses, and who could be proved guilty of at least one beyond a reasonable doubt, were subject to commitment, there was little or no risk that Illinois would use commitment as a substitute for the criminal process. Unlike this case, *Allen* did not present a situation in which the State sought to use a "civil" commitment because it *could not* prosecute and punish in an ordinary criminal proceeding. [For example, there was no claim in *Allen* that the State based its commitment decisions on whether it could prove a sexual offense without the defendant's compelled testimony.]

The State's choice to commit a person it could prosecute established the *bona fides* of its decision to treat rather than to punish.

In *Allen*, the requirement that the State first prosecute and later prove a crime beyond a reasonble doubt in order to commit operated to limit the State's commitment powers to the most dangerous sex offenders, those whose tendencies manifested themselves in punishable conduct. The Illinois commitment statute allowed the State to divert those, like Allen, who suffered from treatable mental illness into a more appropriate form of confinement. But to do this, the State had to forego the opportunity to inflict punishment. In this case, however, the statute is applied to persons whom the State desires to punish further for past conduct, but whom the State cannot openly punish further because of the *ex post facto* and double jeopardy prohibitions. The Kansas statute, unlike the Illinois law in *Allen*, presents the danger, if it is upheld, that nominally civil commitments of dangerous persons will be used as a means of incapacitation instead of the criminal law.

B. The Kansas SVP Act does not require treatment.

The Illinois Supreme Court held that the aim of the Illinois statute before the Court in *Allen* was to offer *"treatment not punishment."* 481 N.E. 2d 690, 694-695 (1985) (emphasis added). This Court undoubtedly gave some deference to the Illinois Court's interpretation of state law, treating it as a presumption that Allen had to overcome. 478 U.S. at 369. By the same token, the Kansas Supreme Court's determination that "the primary objective of the [SVP] Act is *to continue incarceration and not to provide treatment*." Pet. App. 17a,[1] (emphasis

[1] In reaching that conclusion, the Kansas Court no doubt followed its well settled rules of statutory construction which allow it to, "look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished and the effect the statute may have under various constructions suggested." *Brown v. Keill*, 580 P.2d 867, 871 (Kan. 1978). Those factors are very similar to a statutes " 'immediate objective,' its

added), places the burden on the State to show that a court familiar with the background and statutory context of the SVP Act misunderstood the legislature's goal. The State cannot do so because the record convincingly supports the Kansas Supreme Court's view.

Unlike the Illinois provisions which specifically require treatment be designed to effect recovery, the Kansas scheme, far from providing treatment, "finds" that persons targeted are unamendable to treatment (if treatment exists)[2] and that treatment "in a prison setting" is not bene-

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'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.'" Which this Court has recognized as being appropriate guides for the consideration of the constitutionality of an enactment. *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967).

The State would have the Court ignore the historical and political climate in which the SVP Act was passed. The legislation was proposed by a group formed specifically to keep persons incarcerated after completion of their criminal sentences. The only references to treatment in testimony in the legislative hearings came from persons saying that no meaningful treatment was available. The Attorney General called the SVP Act the most meaningful criminal legislation of the session and the current Attorney General declared that the Act would keep the "animals" off the streets indefinitely.

[2] Kansas grudgingly admits that "treatment programs under the Act are still evolving," (Br. Cross-Resp. at 24). But its discussion of the *habeas corpus* proceeding omits the admission by its own clinical director that he was not fully qualified to direct the program and that committees were receiving "essentially no treatment." J.A. 393. The State's attempt to characterize commitment as mental health treatment is at odds with represenations one of its *amici* has made to a federal court in seeking to modify a consent decree governing treatment programs for sexually dangerous persons. According to the Commonwealth of Massachusetts, "professional opinion concerning the most effective treatment of sexually dangerous persons has also changed fundamentally, so that the premise of the decrees' emphasis on mental health treatment approach is now rejected by leading professionals, and the system devised by the decrees based upon that premise is now seen to be counter therapeutic." Memorandum In Support of Defendants' Renewed Motion to Modify Consent Decrees at 7-8, *King v. Greenblatt*, No. 72-288 (filed November 16, 1994). The Commonwealth supported this motion with an affidavit by the director of its treatment program, who also founded and directed the sex offender

ficial to or appropriate for sex offenders subject to commitment under the SVP Act. Putting to one side for the moment the implications of the latter finding for the prison based "treatment" Kansas has elected to provide to committees under the Act, this finding establishes that Kansas' insistence on sentencing and punishment first, followed by commitment, is incompatible with the goal of treatment. Kansas' decision to delay treatment in favor of punishment, especially in view of the fact that evaluation and treatment were available in the criminal proceeding, K.S.A. 22-3429, 3430, 3431, shows that the Kansas statute is not an ameliorative alternative to prosecution and punishment.

Moreover, although Kansas invokes the "findings" of the trial court that committed Mr. Hendricks and the *habeas* court that refused to release him, it ignores the findings of the Kansas Supreme Court made from the record that, "[I]t is clear that the overriding concern of the legislature is to continue the segregation of sexually violent predators from the public." Pet. App. 16a, and the record itself.[3] The admissions of the program director

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treatment program for the State of Washington from 1988-1992. In her affidavit, Dr. Barbara Schwartz asserted that successful sex offender treatment programs are run by corrections agencies, and that "[t]he premise of modern sex offender treatment is that most sex offenders are not mentally ill." Affidavit of Barbara Schwartz, Ph.D. at 8.

[3] The State asks this Court to set aside that finding based upon the determinations by district court judges that treatment is provided. In the first instance, in the face of evidence that no contractor had been retained to provide treatment, that the staff at the facility where persons committed under the SVP Act were to be housed did not have the equipment, training or expertise to provide treatment, J.A. 483,484,552, and that no new staff had been added to provide treatment, J.A. 366-372, the district court found that SRS had established a treatment, J.A. 366-372, the district court found that SRS had established a treatment program *"available perhaps at some time in the future."* J.A. 387 (emphasis added).

That point in the future had not yet arrived when Dr. Charles Befort, Acting Director of the Sexual Predator Treatment Program,

belie the claim that Kansas has "provided for treatment" of persons committed under the SVP Act. To the contrary, the State's enactment of the commitment statute in the face of testimony that it lacked the capacity to provide treatment, its failure to fund treatment and its failure to implement a treatment program even after commitments were ordered under the Act, directly supports the Kansas Supreme Court's view that treatment was "incidental, at best" Pet. App. 16a, to the incapacitative goal of the statute.

C. Kansas has not established a system in which committed persons can be released after the briefest time in confinement.

The possibility that a committed sex offender could be released after only a brief period of confinement bolstered the conclusion that the purpose and effect of the Illinois statute in *Allen* was to treat, not to punish, because it showed that the State was willing to trade a shorter period of confinement for the possibility of enhanced community safety from treatment of persons suffering from genuinely

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testified ten months later in a state *habeas corpus* hearing that Mr. Hendricks and the other committees under the SVP Act were receiving "essentially no treatment". J.A. 393. He elaborated that even though he was the Acting Clinical Director, he did not feel he was fully qualified to be in that position. J.A. 392. He further testified that there were no clinical staff giving treatment to SVP committees other than himself and that he could not give effective treatment because he was the person whose testimony had resulted in their involuntary confinement. J.A. 392-397. Dr. Befort also testified that on the sporadic occasions when a group session was held, they were primarily gripe sessions about the lack of treatment and did not address sexual deviancy issues. J.A. 398-399.

Dr. Befort testified that the committees were receiving "ward milieu" therapy, *Cf. O'Connor v. Donaldson*, 422 U.S. 563, 569 (1975), which he testified was totally inadequate by itself. J.A. 407, 417. Dr. Befort concluded his testimony by telling the court, "In terms of needed treatment relevant to the sexual deviancy, that hasn't been delivered yet." J.A. 420. "Today it is still not available." J.A. 421. In spite of such evidence, the district court concluded that the allegation that *no treatment* was being provided to SVP Act committees was not true. J.A. 453, 454.

treatable mental illnesses. There is no such tradeoff under the Kansas statute, because prosecution and punishment precedes commitment. In an attempt to overcome that deficiency, the State argues that confinement under the SVP Act is not intended to be for life. Br. Cross-Resp. at 8. In making that assertion, the State simply ignores the evidence that the SVP Act is designed to produce legnthy, even permanent confinement. The legislature in its findings recognizes the necessity for "very long term" K.S.A. 59-29a01, confinements and the "poor" prognosis in a prison setting, K.S.A. 59-29a01, which is what the State has provided. And, long term confinement is certainly what the legislature expected to happen. Prior to passing the Act, the legislature was warned by both its opponents and proponents that few if any mental health professionals would be willing to make the required certification that there was probable cause to believe that a committee was "safe to be at large", especially under an all or nothing statute which, unlike that in *Allen*, provided no mechanism for release, supervision and treatment in the community. While the Act provides for a committee to petition for release without such a certification, the procedure is such that the Kansas Supreme Court found "release through this avenue seem[s] improbable." Pet. App. 10a.

None of the features this Court found dispositive in *Allen* are applicable to the Kansas Sexually Violent Predator Act. The State's argument therefore boils down to its erroneous claim that *Allen* necessarily determined any scheme for the commitment of sex offenders to be civil, regardless how the statute operates.

II. THE PURPOSE AND EFFECT OF THE KANSAS SVP ACT IS PUNITIVE

Because, as we have shown, *Allen v. Illinois* involved a fundamentally different statute and does not govern this case, the Court must expand its focus to include dozens of other decisions addressing the distinction between civil and criminal proceedings. We agree with the State that this Court has used a two step approach in determining

whether a sanction is subject to constitutional restrictions applicable to criminal proceedings. Br. Cross-Resp. at 15. The first step is to determine whether the legislature intended to create a civil or a criminal sanction. *United States v. Ursery*, 116 S.Ct. 2135, 2142 (1996). Even though the Kansas legislature placed a "civil" label on the SVP Act, that "does not foreclose the possibility it has a punitive character." *Montana Department of Revenue v. Kurth Ranch*, 114 S.Ct. 1937, 1945 (1994). The question then becomes "whether the statutory scheme was so punitive either in purpose or effect as to negate [the legislature's] intention to establish a civil remedial sanction." *Ursery*, 116 S.Ct. at 2142 (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984) (internal quotation omitted). Because this analysis turns on "the character of the actual sanctions imposed on the individual by the machinery of the state", *United States v. Halper*, 490 U.S. 435, 447 (1989), "[I]n making such an assessment, 'the labels 'criminal' and 'civil' are not of paramount importance." *Kurth Ranch*, 114 S.Ct. at 1945 (quoting *Halper*, 490 U.S. at 447).[4]

From its decision in *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867), to *Halper* and *Kurth Ranch* the Court has consistently recognized that, "the Constitution constrains the State's ability to denominate proceedings 'civil' and so dispense with the criminal procedure protections embodied in the Bill of Rights." *Kurth Ranch*, 114 S.Ct. at 1953 (O'Connor, J., dissenting). This Court has recognized that some sanctions are inherently punitive. *See Kurth Ranch*, 114 S.Ct. at 1952 (O'Connor, J., dissenting) (quoting *United States v. Ward*, 448 U.S. 242, 248-249 (1980)) ("Some governmental exactions

[4] The State cites *Ursery*, at 116 S.Ct. at 2148 n. 3, as authority for its assertion that affixing a civil label on an act "establishes a presumption" that it is civil. That assertion ignores the plain language of the note which clearly relies on the fact that a forfeiture is designated as civil "*and proceeds in rem*" to establish such a presumption Clearly, proceedings under the SVP Act are not *in rem*.

are so punitive they may be imposed only in a criminal proceeding"). In *Breed v. Jones*, 421 U.S. at 529, the Court concluded it was "simply too late in the day," to treat as civil for double jeopardy purposes, "a proceeding whose object is to determine whether [the person] has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years." Because the SVP Act meets this standard, it can be considered civil only if the State can show, as Illinois did in *Allen*, that it has "disavowed any interest in punishment." 478 U.S. at 370. Assertions that an objectively punitive sanction is really "ciivl" because it is for the purpose of treatment should, as the Court said of the juvenile process in *In re Gault*, 387 U.S. 1, 21 (1967) "be candidly appraised . . ." *quoted in Breed v. Jones*, 421 U.S. at 529.

In our opening brief on the cross-petition, we suggested a streamlined version of the *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), test, which distills its seven factors[5] to three: (1) whether the factual predicate for the sanction is a crime; (2) whether the sanction takes a form that was historically used as punishment; and (3) whether legislature's predominant purpose is a non-punitive goal, such as treatment of the mentally ill, rather than a punitive goal such as incapacitation. The first of these factors combines the question whether *scienter* is required with the question whether the conduct is already a crime, because *scienter* historically distinguished crimes from

[5] The seven factors are, "Whether the statute involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it applies is already a crime, whether an alternative purpose to which it may be rationally connected is assignable for it, and whether is appears excessive in relation to the alternative purpose assigned." 372 U.S. at 168, 169.

civil wrongs. Thus a *scienter* requirement was evidence that the factual predicate for a sanction was a crime, even if the conduct did not actually appear in the penal code.[6] The second factor combines the generally trivial question whether the sanction involves an affirmative disability or restraint, with the important question whether the sanction is historically used to punish. History is important for two reasons. First, if a sanction is historically used to punish, it is likely that the Framers of the Constitution thought proceedings leading to the imposition of the sanction should be subjected to the restraints of provisions such as the double jeopardy and *ex post facto* clauses. Second, the historical association of a sanction with punishment makes it likely that, regardless of the label affixed by the legislature, it will be understood by the legislature, the community, and the person upon whom it is imposed as punishment. If so, the label is meaningless and should be disregarded.

The third factor in the inquiry we propose combines the three *Kennedy* inquiries into purpose. There is at times a substantial overlap between purposes served by civil and criminal law enforcement. Some of the traditional goals of criminal law, deterrence, rehabilitation, incapacitation and retribution have been noted by this Court to serve remedial and regulatory purposes as well. This Court recently said in *Bennis v. Michigan*, 116 S.Ct. 994,

[6] At common law, a *scienter* requirement was one of the principal features distinguishing a crime from the overlapping tort. *See* 3 William Holdsworth, *A History Of English Law* 373-374 (1996 reprint) (5th ed. 1942); 2 Bracton, *On The Laws And Customs Of England* 289 (Woodbine ed.) (1968). For this reason, when a statute requires proof of *scienter* even though there is no such offense in the criminal code, a sanction is likely to be deemed criminal. *See e.g., Child Labor Tax Case*, 259 U.S. 20, 37 (1922) (Congress cannot evade restrictions on its regulatory power over commerce by styling a penalty with a *scienter* requirement a tax.) *Scienter* remains an important hallmark of criminal liability. *See Morrisette v. United States*, 342 U.S. 246 (1952); *Liparota v. United States*, 471 U.S. 419, 426 (1985).

1000 (1996), that deterrence may be an objective of a civil enforcement scheme. Rehabilitation, one of the goals of the Kansas sentencing at the time of Mr. Hendricks 1984 conviction, K.S.A. 21-4601, is also a well recognized goal of true "civil commitments" for treatment.

Incapacitation has historically been recognized as a goal of criminal punishment. *See* 4 William Blackstone, *Commentaries on The Common Laws of England 10* (21st ed. 1844); 1 Francis Wharton, *A Treatise on the Criminal Law* § 2 at (28th ed. 1880). On the other hand, incapacitation is also recognized as a goal of hospitalization of the dangerously mentally ill, *Addington v. Texas*, 441 U.S. 418 (1979), and the temporary "regulatory" confinement of persons accused of serious crimes and found to be very likely to commit new offenses while pending trial. *United States v. Salerno*, 481 U.S. 739 (1987).

Even retribution is encountered in civil proceedings as the reason for awarding punitive damages. *BMW v. Gore*, 116 S.Ct. 1589 (1996) ("[p]unitive damages may properly be imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition"); *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257, 275 (1989) ("punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law"). Therefor, an examination of the purpose of the sanction alone is not a sufficient indicator of how it should be characterized in determining whether constitutional protections applicable to criminal prosecutions should be applied. Instead, as in *Allen*, a genuine traditional *parens patriae* goal such as the treatment of the mentally ill justifies classifying a statutory scheme as civil, even when it shares many attributes of a criminal proceeding.[7]

[7] The reader is referred to a more detailed discussion of these issues found in the *Amicus Curiae* brief filed by the National Association of Criminal Defense Lawyers.

A. Incapacitation is not a "civil" purpose.

Kansas erroneously implies that because incapacitation for community safety is compatible with civil or regulatory proceedings, that an incapacitative purpose is civil rather than criminal. But incapacitation, as Justice Kennedy recognized in his dissenting opinion in *Foucha v. Louisiana,* has long been a hallmark of criminal punishment. 504 U.S. at 99. The protection of community safety and deterrence of crime by incapacitating dangerous offenders is widely recognized in treatises and statutes as an important, if not the most important goal of punishment 1 Charles E. Torcia, *Wharton's Criminal Law* § 1 at 2-3 (15th ed. 1993); National Research Council, *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates (1978);* Herbert Packer, *The Limits of the Criminal Sanction* 50-51 (1968); Wayne R. LaFave & Austin W. Scott, Jr., *Handbook on Criminal Law* 9 (1972), K.S.A. 21-4601. As the Court recognized in *Foucha,* if "civil" proceedings could be used to imprison dangerous people, there would be little use for the criminal law. 504 U.S. at 83. None of this Court's decisions upholding incapacitative confinement support the unlimited use of civil proceedings to protect the community. To the contrary, the Court has confined its acceptance of incapacitative confinement to limited circumstances in which incapacitation is tied to another governmental power, such as the legislature's plenary authority over persons illegally in the country, *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206 (1953); *Carlson v. Landon,* 342 U.S. 524, 537-42 (1952), the court's power over persons under its jurisdiction before trial, *United States v. Salerno,* 481 U.S. 739 (1987); *Schall v. Martin,* 467 U.S. 253 (1984), or the *parents patriae* power of the State over the mentally ill. *Addington.*

B. The factual predicate for commitment is the commission of a crime.

The State ignores this Court's recent observation in *Montana Dept. of Revenue v. Kurth Ranch,* that tying a sanction to an *arrest* for a crime is "significant of penal and prohibitory intent." *Kurth Ranch,* 114 S.Ct. at 1947 (citation omitted). *See also United States v. U.S. Coin & Currency,* 401 U.S. 715, 721-722 (1971); *United States v. LaFranca,* 282 U.S. 568, 575 (1931); *Lipke v. Lederer,* 259 U.S. 557, 562 (1922); *Ursery,* 116 S.Ct. at 2144. *A fortiori,* requiring proof beyond a reasonable doubt that a person committed a crime as a precondition to imposing a sanction is evidence the sanction is intended to punish. Although the Court in *Allen* concluded that this requirement under Illinois law did not make commitments criminal, it did so in a markedly different context. In *Allen,* the requirement of proof that the person committed a crime narrowed the class of persons subject to commitment *instead of prosecution* prevented the abuse or overuse of the commitment power, while here the effect is to limit the commitment to persons already prosecuted and confined by the State, persons whom the State has evinced a desire to punish.

The State contends that its case does not begin and end with the proof of a criminal charge or conviction. To the contrary, that is exactly all the State is required to prove because of the definition of "mental abnormality". The State proves this element, which it now refers to as a "mental condition" in circular fashion by using the past criminal act to both establish the existence of the condition which then has as part of its definition the possibility that the act will be repeated in the future. Thus the conviction of a sex offense, the "mental abnormality" and the potential dangerousness are all proven simply by proof of

a criminal act for which the person has already been punished.

C. Confinement in a prison facility is historically used to punish.

Confinement of a person following a finding that he has committed a violation of the criminal law is historically viewed as punishment. In the context of dealing with sexual offenders, in *Specht v. Patterson,* 386 U.S. 605, 608, 609 (1966), this Court recognized that imprisonment of a sexual psychopath after conviction was "criminal punishment even though it is designed not so much as retribution as it is to keep the individual from inflicting harm." There is no reason for the Court to reach a different conclusion here. Contrary to the State's reasoning, the difference between *Allen* and *Specht* is that Illinois disavowed any interest in punishment and abandoned criminal prosecution while the Colorado statute, similar to a recidivist sentencing provision, simply allowed for extended incarceration following conviction.

The State correctly states that there is historical precedent for confinement "for safe custody, and not for punishment" of persons whose crimes resulted from "madness" and the "furiously mad" who required immediate confinement in order to stop or prevent acts of violence. Commitments in such situation, which clearly are an exercise of the state's *parens patriae* powers, provide no support for a commitment under the SVP Act because, unlike in the first instance, Mr. Hendricks' criminal actions did not result from insanity. He was responsible for his actions which led to his plea and the State acknowledged that responsibility when it entered into negotiations with him and sentenced him on the convictions. Nor does it matter in relations to him what the state can do to or with the "furiously mad" or "furiously insane" who are out of control and in need of short term confinement because he is not

mentally ill. Therefore, the State's reliance on the cited authorities for the proposition that long term confinement in a prison facility is not punishment is clearly misplaced.[8]

The State's *amici* Menninger Foundation, American Alliance for Rights and Responsibilities, *et al.*, addressing the due process issue, attempt to persuade the Court that because confinement of the dangerously disturbed for the protection of themselves and others was widespread early in our country's history, confinements under the SVP Act should be sanctioned today. While it may be true that commitments which would not be permitted under today's standards occurred, they were still motivated by the *parens patriae* concern of caring for those unable to care for themselves, even if nothing we would currently consider treatment was provided. The fundamental reason why that history does not support the SVP Act is because the commitments cited did not follow the commission of criminal conduct by mentally responsible persons. Confinement imposed for such conduct was and is punishment.

D. Confinement under the SVP Act cannot be adequately supported as providing treatment, rather than punishment.

The final factor in our proposed test is whether the sanction is adequately explained by a regulatory or remedial purpose, rather than punishment. In this portion, we are concerned with whether the sanction serves the traditional aims of punishment, retribution and deterrence, which must be viewed in the broad sense of promoting

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[8] The State further attempts to establish that, historically, persons of "ill fame" could be required to post bonds sufficient to compensate others for harm they might do or remain in custody as a means of preventive detention. As authority for that proposition, this Court's opinion in *Ex parte Burford,* 7 U.S. (3 Cranch) 448 (1806) (Marshall, C.J.), is cited. A careful reading of that case clearly indicates that the Court considered it a criminal proceeding, and the requirement of posting a bond was akin to a condition of probation rather than an order for preventive detention.

crime prevention. Incapacitation is a form of specific deterrence and has long been recognized by this Court as one of the purposes of criminal punishment. *United States v. Brown*, 381 U.S. 437, 458 (1965). The Kansas Supreme Court found after examining the language of the SVP Act, the context in which it was passed and the subsequent treatment, or more correctly the lack thereof, of persons committed under its provisions that it is "clear that the primary objective of the Act is to continue incarceration and not provide treatment." Pet. App. 17a.

The State contends that there is no evidence that the committees under the SVP Act are treated like prisoners. To the contrary, they are housed in a DOC facility which also houses persons who are being punished because they committed violations of the criminal law. They are segregated from persons who have been civilly committed for treatment of mental illness and, unlike such persons, they are subjected to criminal prosecution if they leave the facility. K.S.A. 21-3810. Further evidence that SVP Act committees are treated like prisoners was provided by the fact that at the state *habeas corpus* hearing. Mr. Hendricks and the other committees were forced to set through the hearing in jail garb confined by belly chains, ankle chains and handcuffs, a procedure unheard of in a true civil commitment hearing. Transcript of Habeas Corpus Hearing p.86.

The Kansas Court further found, based no doubt on the State's expert's testimony, that "Hendricks is not mentally ill and the crimes for which he was imprisoned were not the result of mental illness." Pet. App. 20a. The State does not cite one bit of evidence contrary to that finding. Because Mr. Hendricks is not mentally ill, the State cannot rely on incapacitation under its *parens patriae* powers to confine him for treatment as permitted by *Addington*. Without such a justification, the State seeks to rely on the regulatory goal of protecting the community which was recognized by this Court in *United States v. Salerno*, 481

U.S. 739 (1987). While *Salerno* allows pre trial detention in connection with the criminal process involving the most serious crimes, this Court emphasized that the detention permitted was strictly limited in duration. 481 U.S. at 747. Further, this Court refused to extend the use of regulatory detention permitted in *Salerno* to allow for indefinite long term commitment based upon a perception of dangerousness, such as provided for by the SVP Act, in *Foucha v. Louisiana*, 504 U.S. 71 (1992). If the bulkhead against such "civil" confinements is removed, there will be nothing to prohibit the logical progression from incarcerating "sexually violent predators" to taking away the liberty of any group that falls out of favor with the legislature, and is "found" by that body to pose a risk of engaging in undesirable conduct at some unspecified point in the future. Our society as we know it, in which "liberty is the norm" *Salerno*, 481 U.S. at 755, could not survive such unbridled "excited action by the States". *Cummings v. Missouri*, 71 U.S. at 322.

CONCLUSION

The judgment of the Kansas Supreme Court should be affirmed.

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October Term, 1995

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On Writ of Certiorari to the
Supreme Court of Kansas

BRIEF OF AMICUS CURIAE STATE OF WISCONSIN IN SUPPORT OF PETITIONER AND CROSS-RESPONDENT

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QUESTION PRESENTED

Do sexually violent person commitment statutes that provide for the involuntary civil commitment of dangerous sexual offenders, who suffer substantiated mental disorders at the time of their scheduled release from prison, impose punishment within the meaning of the constitutional Double Jeopardy and Ex Post Facto prohibitions?

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BRIEF OF AMICUS CURIAE STATE OF WISCONSIN IN SUPPORT OF PETITIONER AND CROSS-RESPONDENT

INTEREST OF THE AMICUS

This brief is submitted by amicus through the Attorney General of Wisconsin in accordance with Rule 37.4 of the Rules of the Supreme Court with respect to the Double

Jeopardy and Ex Post Facto issues raised by the cross-petitioner.

Wisconsin has enacted legislation similar to the Kansas statute at issue,[1] which permits the state to involuntarily commit mentally disordered, dangerous, sexually violent persons.[2] This case concerns whether the Double Jeopardy Clause or the Ex Post Facto Clause renders unconstitutional the involuntary mental commitment of a person who has been convicted of and has served a prison term for a sexually violent offense, where the involuntary mental commitment is based on the person's current mental condition that makes the person likely to commit sexually violent offenses and who is dangerous because he is likely to commit such offenses.

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[1]The Wisconsin Supreme Court rejected challenges comparable to the challenges raised in this case and upheld the constitutionality of Wisconsin's sexually violent person commitment statute, which is similar to the Kansas statute in material respects, in *State v. Carpenter*, 541 N.W.2d 105 (Wis. 1995), and *State v. Post*, 541 N.W.2d 115 (Wis. 1995). As a result of these decisions, Wisconsin currently has three cases pending before this Court: *William A. Schmidt v. Wisconsin*, No. 95-8131; *William E. Marberry v. Wisconsin*, No. 95-9308, and *Samuel Post and Ben Oldakowski v. Wisconsin*, No. 95-8204.

[2]Wisconsin's statute and the statutes enacted by other States share critical features and are comparable in relevant respects to the Kansas law. The terminology of the statutes varies, but those differences are not significant to the constitutional issues. For example, the Kansas law is titled "The Kansas Sexually Violent Predator Act" and the Wisconsin law is titled "Sexually Violent Person Commitments." The Kansas statute uses the term "mental abnormality" and the Wisconsin statute uses the term "mental disorder." For convenience sake, this brief will use the terms "sexually violent person commitment statutes" and "mental disorder."

The States have the authority and duty to exercise their police power to incapacitate and treat mentally disordered, dangerous persons in order to protect the community from such persons. This case presents the question whether the United States Constitution prohibits the States from enacting the protective method chosen by Kansas and other States which have enacted sexually violent person commitment statutes. The Court's analysis of whether these statutes impose unconstitutional punishment or constitute a prohibited successive criminal proceeding will directly affect the States which have enacted or are contemplating enacting such statutes. The analysis may also affect other legislative measures or governmental conduct alleged to violate the Double Jeopardy and Ex Post Facto Clauses. Wisconsin also supports the position and arguments presented in the brief amici curiae filed by the State of Washington on the substantive due process issue.

SUMMARY OF ARGUMENT

State statutes that are designed to protect the public from mentally disordered, dangerous, sexually violent persons and to treat such persons for their disorders and the conduct related to the disorders; whose provisions are reasonably related to those remedial, nonpunitive purposes; and that are not excessive in relation to those purposes, do not impose punishment within the meaning of the Double Jeopardy and Ex Post Facto Clauses of the United States Constitution.[3] These statutes are involuntary mental commitment statutes in purpose and in critical form and structure. Like other involuntary mental

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[3]If the statute does not impose punishment for purposes of the Double Jeopardy Clause, it will not impose punishment for purposes of the Ex Post Facto Clause. Accordingly, the Ex Post Facto Clause will not be separately addressed at length in this brief.

commitment statutes, they are enacted pursuant to the State's police power authority to protect the public and to treat the dangerous, mentally disordered. These involuntary mental commitment statutes do not constitute impermissible punishment simply because the statutes apply to persons who have already been prosecuted and convicted and have served sentences for sexually violent offenses which occurred before enactment of the statute. The purpose of these statutes is not to punish for past or future acts, but to regulate a present situation by incapacitating and treating those whose mental conditions make them dangerous to the public.

These civil commitment statutes do not impose punishment simply because they deprive individuals of liberty. Nor are commitments under such statutes converted to punishment simply because States have chosen to afford these individuals many procedural due process protections associated with the criminal trial process. Commitment under these statutes is not punishment simply because commission of a sexually violent offense is one prerequisite to the applicability of the statute. The function of a predicate act of sexual violence under the commitment scheme is not to punish that past act. The past act, along with current diagnosis and treatment history, is evidence of the person's present mental condition and dangerousness. A past offense is a prerequisite only because it identifies the persons who are most dangerous and most at risk to commit future offenses. It also ensures that persons who only fantasize about, but do not commit, violent sexual acts will not be covered by the law.

These statutes are designed to serve important and legitimate nonpunitive governmental goals. They are not so punitive in purpose or effect so as to negate these goals. The presence of some deterrent effect and the fact the statutes have some connection to criminal activity falls short of the clear proof necessary to show the statutes are

criminal or punitive. The provisions of these statutes are reasonably related to the legitimate, nonpunitive goals they are designed to serve and are not excessive in relation to those goals. Thus, commitment under these statutes does not constitute punishment within the meaning of the Double Jeopardy and Ex Post Facto Clauses of the United States Constitution.

This Court should approach the constitutional questions presented with full cognizance of, and respect for, the States' prerogatives in making policy and value judgments about effective ways to protect their citizens from sexual violence. It is this Court's delicate task to ensure that it fulfills its fundamental duty to enforce the Constitution without substituting its conceptions of wisdom or propriety for that of the state legislators who enacted the laws and of the citizens who elected them.

These statutes do not violate the core values protected by the Double Jeopardy and Ex Post Facto Clauses. Accordingly, the statutes are constitutional and challenges to them must be rejected by this Court.

ARGUMENT

INVOLUNTARY COMMITMENTS OF MENTALLY DISORDERED, DANGEROUS SEXUAL OFFENDERS WHO HAVE COMPLETED PRISON TERMS, AFTER A TRIAL ON THE ISSUES OF MENTAL CONDITION AND DANGEROUSNESS ACCOMPANIED BY SUBSTANTIAL DUE PROCESS PROTECTIONS, DO NOT VIOLATE THE DOUBLE JEOPARDY OR EX POST FACTO CLAUSES OF THE CONSTITUTION.

A. In Reviewing The States' Exercise Of Police Power, This Court Does Not Substitute Its Own Value And Policy Judgments For Those Of The States.

In reviewing sexually violent person commitment statutes, this Court must be mindful of the fact that the States have primary authority to enact measures to deal with dangerous, mentally disordered persons and that this Court can intervene only if the States' chosen method violates a constitutional provision.

There is no constitutional basis for this Court to declare that the States cannot constitutionally make the following policy determination: sexually violent offenders should be punished for their crimes; the pain of punishment and experience of prison (including rehabilitation programs and treatment) will enable most offenders to avoid committing sexually violent crimes when they are released; but some offenders, those who suffer mental disorders or abnormalities that make them especially high risk to reoffend, should be subject to involuntary civil commitment at the conclusion of their prison terms. There is no constitutional basis for decreeing that the States may impose involuntary mental commitment in lieu of punishment, but that they may not do so sequential to and in addition to punishment. There is nothing in the Double

Jeopardy Clause or the Ex Post Facto Clause that suggests, much less mandates, that one statutory system is constitutionally permissible and the other is not.

It is beyond dispute that the States have authority under their police power to protect their citizenry "from the dangerous tendencies of some who are mentally ill," *Addington v. Texas*, 441 U.S. 418, 426 (1979), and that such commitments are civil. *Allen v. Illinois*, 478 U.S. 364 (1986).

> The States have traditionally exercised broad power to commit persons found to be mentally ill. The substantive limitations on the exercise of this power and the procedures for invoking it vary drastically among the States. The particular fashion in which the power is exercised--for instance, through various forms of civil commitment, defective delinquency laws, sexual psychopath laws, commitment of persons acquitted by reason of insanity--reflects different combinations of distinct bases for commitment sought to be vindicated.

Jackson v. Indiana, 406 U.S. 715, 736-37 (1972) (footnotes omitted).

In the past, many States have had laws providing for civil commitment of dangerous, sexually disordered persons. Such statutes provided for involuntary civil commitment of persons charged with or convicted of sexual offenses who were found to have mental conditions that made them dangerous to the public. These statutes generally provided for commitment in lieu of punishment, but commitment could be extended beyond the maximum prison term which could have been imposed for the sexual offense. *See generally Humphrey v. Cady*, 405 U.S. 504 (1972).

The Kansas statute at issue here (and comparable statutes enacted in Wisconsin and other States) is different from the old form of commitment statute that provided for commitment in lieu of punishment. The new statutes provide for commitment for purposes of incapacitation and treatment following punishment. Under the new statutes, the State is not forced to choose between punishment and commitment. These new statutes have been challenged on double jeopardy and ex post facto grounds because they allow the State to convict and punish all deserving sexual offenders and then to civilly commit for purposes of incapacitative treatment those who have mental disorders that make them particularly dangerous to the public if allowed to go at large. These statutes permit commitment only after a trial, accompanied by substantial due process protections, at which the State must prove the mental condition and dangerousness beyond a reasonable doubt.[4]

Nonetheless, the statutes are challenged as violating the Double Jeopardy Clause on the theory that the commitment constitutes punishment and that the punishment is unconstitutional because it subjects the individual to a successive trial and punishment. Because these laws apply to persons who committed their predicate offenses before enactment of the statutes, challengers claim they violate the Ex Post Facto Clause because they make more burdensome the punishment for a crime after its commission.

This Court has already upheld the "commitment in lieu of criminal sentence" type of statute against a challenge that the statute imposed punishment without affording

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[4]Thus, these statutes do not suffer the constitutional infirmities identified in statutory schemes that permitted potential long-term commitment without adequate procedural protection and without proof of mental disorder and dangerousness. *See, e.g., Baxstrom v. Herold*, 383 U.S. 107 (1966); *Specht v. Patterson*, 386 U.S. 605 (1967).

guaranteed constitutional protections. *Allen v. Illinois*, 478 U.S. 364 (1986). But an *Allen*-type statute is not the only type of statute that is permissible.

For this Court to declare there is only one constitutionally acceptable type of commitment for the dangerous, sexually disordered would be to encroach on the policy and decisionmaking choices of the States, something this Court has repeatedly declined to do. *See Marshall v. United States*, 414 U.S. 417, 427 (1974); *Jones v. United States*, 463 U.S. 354, 364 n.13 (1983). In the involuntary commitment context, the legal concept of the degree--and manifestation or effect--of mental disorder sufficient to justify involuntary commitment, and the form that commitment should take, reflects society's "judgment on the basic policy question of the extent to which the state should interfere with the liberty of the individual in the interest of all." Henry Weihofen, *The Definition of Mental Illness*, 21 Ohio State L.J. 1, 9 (1960). Once a State has answered this basic policy question, the courts are not free to interfere absent compelling evidence of a constitutional violation.

Whether the statute evinces good or bad policy or constitutes a wise or foolish use of state resources is a concern for the legislature, not the courts. The very fact the legislature has enacted a particular law demonstrates that it concluded that other policy concerns outweighed those articulated by the critics. *See United States v. Hess*, 317 U.S. 537, 551-52 (1943).

Any constitutional infirmity in these statutes must be found in the words and purpose of the Constitution itself. In judging the constitutionality of the States' exercise of police power, the Court must not abdicate its duty to enforce the Constitution, but neither is it free to invalidate State policies with which it disagrees or to mandate its own moral code. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 849-50 (1992).

Proper judicial restraint, neither an abdication by the Court of its duty to enforce the Constitution, nor usurpation of the duties that belong to others, is indeed "the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., separate opinion). *See also Trop v. Dulles*, 356 U.S. 86, 119-20 (1958).

This Court has both the constitutional power and responsibility to check unconstitutional exercises of power by the executive and legislative branches of State and Federal government. But the only check against the unconstitutional exercise of power by the Court is its "own sense of self-restraint." *United States v. Butler*, 297 U.S. 1, 78-79 (1936) (Stone, J., dissenting), *quoted in Furman v. Georgia*, 408 U.S. 238, 467 (1972) (Rehnquist, J., dissenting).

This Court must exercise that proper restraint in reviewing the commitment statute at issue here. "In a civil commitment state power is not exercised in a punitive sense." *Addington v. Texas*, 441 U.S. at 428. No constitutional principle or provision wrests this commitment power from the States. No constitutional principle or provision makes the exercise of the police power punitive here, when it is not punitive in any other civil commitment context.

> There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.

O'Connor v. Donaldson, 422 U.S. 563, 582-83 (1975) (Burger, C.J., concurring). It is decidedly the province of the States to weigh and balance the medical, psychological, religious, philosophical, and moral views of the accountability of and proper response to those whose substantiated mental disorders repeatedly subject the

community and innocent victims to the risk and fear of sexual violence. *See Powell v. Texas*, 392 U.S. 514, 536-37 (1968) (plurality opinion).

The guarantee of individual freedom from governmental oppression that forms the core of the constitutional protections against Double Jeopardy and Ex Post Facto laws is not violated by sexually violent person commitment statutes. The Kansas statute and its like are constitutional and must be upheld.

B. Commitment Proceedings Under Sexually Violent Person Commitment Statutes Do Not Constitute Acts Of Governmental Oppression Of The Sort Prohibited By The Double Jeopardy And Ex Post Facto Clauses.

1. The Double Jeopardy and Ex Post Facto Clauses protect against governmental oppression without sacrificing legitimate governmental interests.

Because the cases coming before this Court have presented double jeopardy arguments in a wide variety of contexts, this Court's decisions present no unerring formula by which to test whether a legislative measure constitutes impermissible punishment or a successive criminal proceeding.[5] But this Court has repeatedly

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[5]Authors have offered many criticisms of, and suggestions for reconciling, the approaches the Court has taken to double jeopardy issues. A small selection includes: George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 Univ. Ill. L. Rev. 827; Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 Hastings L.J. 1325 (1991); Peter J. Henning, *Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double*

articulated that the core value of the Double Jeopardy Clause is to protect against governmental oppression.[6] The Double Jeopardy Clause does not, however, prohibit the States from protecting legitimate societal interests. Incapacitative treatment is a legitimate societal interest. Sexually violent person commitment statutes that serve that nonpunitive purpose and are not excessive in relationship to that purpose do not represent governmental oppression.

The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. It protects the individual from governmental oppression without forfeiting society's legitimate needs.

Every proceeding subsequent to another is not necessarily "an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *United States v. Scott*, 437 U.S. 82, 91 (1978).

Jeopardy, 31 Am. Crim. L. Rev. 1 (1993); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795 (1992); Stanley E. Cox, Article, *Halper's Continuing Double Jeopardy Implications: A Thorn By Any Other Name Would Prick As Deep*, 39 St. Louis L.J. 1235 (1995); Note, *Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and Its Use in the Lovett, Trop, Perez, and Speiser Cases*, 34 Ind. L.J. 231 (1959); Peter Westen and Richard Drubel, *Toward A General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81; Brian L. Summers, *Double Jeopardy: Rethinking the Parameters of the Multiplicity Prohibition*, 56 Ohio State L.J. 1595 (1995); Monroe G. McKay, *Double Jeopardy: Are the Pieces the Puzzle?*, 23 Washburn L.J. 1 (1983).

[6]Governmental action that is perceived as oppressive by the subject individual is not governmental oppression within the meaning of the Constitution. *Cf. Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1945 n.14 (1994).

The Double Jeopardy Clause defines the proper relationship between the individual and the State by prohibiting governmental action that constitutes governmental oppression. But the Constitution also accommodates the States' legitimate societal interests in protecting the community from those who commit violence. *See Garrett v. United States*, 471 U.S. 773, 796 (1985) (O'Connor, J., concurring). The Double Jeopardy Clause does not require the government to vindicate all its societal interests in a single proceeding. *See United States v. Jorn*, 400 U.S. 470, 483-84 (1971). Thus, the Double Jeopardy Clause also defines the proper relationship between the individual and the community. A second proceeding is not barred in some situations simply because to do so would be too high a price for society to pay. *Burks v. United States*, 437 U.S. 1, 15 (1978) (quoting *United States v. Tateo*, 377 U.S. 463, 466 (1964)). The Double Jeopardy Clause allows the States to create and use different measures to pursue a variety of legitimate societal interests. Successive proceedings, even successive criminal trials, are generally permitted.[7] They are prohibited only where a second trial would constitute an unconstitutionally oppressive use of the criminal process by the States. For example, a second criminal trial following acquittal is prohibited because the second trial itself is punitive. *See Burks v. United States*, 437 U.S. 1.

Similarly, the Ex Post Facto Clause "was intended to secure substantial personal rights against arbitrary and

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[7]*See United States v. Dixon*, 509 U.S. 688 (1993) (successive trial and punishment are not barred if offenses charged are not the same offense within meaning of Double Jeopardy Clause); *Burks v. United States*, 437 U.S. 1 (1978) (second trial barred if conviction reversed on appeal on grounds of insufficient evidence, but not if reversal is based on trial error); *Arizona v. Washington*, 434 U.S. 497 (1978) (second trial not barred after mistrial based on manifest necessity).

oppressive legislative action." *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915).

In *Collins v. Youngblood*, 497 U.S. 37, 43 (1990), this Court clarified that the Ex Post Facto Clause means that "[l]egislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts" because it is oppressive to do so. The Ex Post Facto Clause only prohibits a law if it punishes as a crime an act previously committed, which was innocent when done; makes more burdensome the punishment for a crime, after its commission; or deprives one charged with crime of a defense available according to law at the time when the act was committed. *Id.* at 52. Laws which do not do one of these three specified things, but merely alter the situation of a party to his disadvantage, are not prohibited by the Ex Post Facto Clause. *Id.* at 47-52.

In both the Ex Post Facto and Double Jeopardy Clause contexts, the question is whether a legislative measure or successive governmental action constitutes punishment so as to be barred by either clause. At its core, the question is whether the challenged legislative measure or governmental action amounts to governmental oppression. A legislative measure or governmental action does not amount to governmental oppression if it is designed to serve nonpunitive goals, it bears a rational relationship to those goals, and it is not excessive in relation to those goals.[8]

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[8]*Cf. United States v. Halper*, 490 U.S. 435, 448-49 (1989) (civil penalty constituted punishment in particular case because it bore no rational relation to a remedial goal and was overwhelmingly excessive in light of goal).

2. Sexually violent person commitment statutes are designed to serve civil, nonpunitive, remedial goals; they bear a rational relation to those goals; and they are not excessive in light of those goals.

In *United States v. Ursery*, 116 S. Ct. 2135 (1996), this Court set forth an analysis for determining whether a successive governmental action constitutes punishment within the meaning of the Double Jeopardy Clause. The Court relied on *United States v. Ward*, 448 U.S. 242, 247-48 (1980), which had utilized the considerations listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). The Court's reliance on these cases teaches that the *Ursery* approach is not limited to forfeiture or monetary sanction cases.

The legislature's intent to create a civil, nonpunitive, remedial or regulatory measure is evident if the measure or action is facially, nominatively or structurally civil. If the intent or design of the statute was to create a civil, nonpunitive, remedial or regulatory statute, there is a presumption that it is not subject to double jeopardy. *Ursery*, 116 S. Ct. at 2148 n.3. This presumption can be overcome only by the "clearest proof" that the action or measure is nonetheless "so punitive either in purpose or effect" as to be equivalent to a criminal proceeding, a punitive statute that imposes punishment. *Id.* Applying this analysis to sexually violent person commitment statutes, the Court must reach the conclusion that these commitment statutes are not punitive or criminal and do not impose punishment within the meaning of the Double Jeopardy or Ex Post Facto Clause.

The civil, nonpunitive intent and design of the legislative measure or action is clearly demonstrated by the statute itself if the nature and operation of the statute have traditionally been viewed as civil proceedings. *Ursery*, 116 S. Ct. at 2142, 2147-48. Involuntary civil

commitment statutes have historically been viewed as nonpunitive. This Court has stated, "[i]n a civil commitment state power is not exercised in a punitive sense." *Addington v. Texas*, 441 U.S. at 428. The States enacting sexually violent person commitment statutes intended and designed them to be civil commitment statutes.[9]

More importantly, these statutes are comparable to other civil commitment statutes in nature and critical structure. Like other civil commitment statutes, sexually violent person commitment statutes require the State to prove the person suffers a mental disorder and that he is dangerous. Like other subjects of civil commitment, sexually violent person committees are placed in the custody of the department of health and social services, not the department of corrections, for control, care and treatment. Like other civil commitments, sexually violent person commitments are conditioned on the presence of a particular mental disorder. Like other civil commitment statutes, under these statutes the individual is entitled to release when the conditions justifying commitment abate.

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[9]In rejecting Double Jeopardy and Ex Post Facto Clause challenges to Wisconsin's sexually violent person commitment statute (ch. 980, Wis. Stats.), the Wisconsin Supreme Court reviewed the language of the statute itself, the provisions of the statute regarding treatment, the nature and place of confinement and the provisions regarding supervised release, periodic review and entitlement to discharge when the person's mental disorder or dangerousness abates. The court concluded that "[t]he emphasis on treatment in ch. 980 is evident from its plain language" and that the statute's provisions "lead us to conclude that the statute is aimed primarily at treating the sexually violent person, not punishing the individual." *State v. Carpenter*, 541 N.W.2d 105, 110-11 (Wis. 1995). The Washington Supreme Court reached similar conclusions regarding that State's statute. *In re Young*, 857 P.2d 989, 992, 996-1000 (Wash. 1993).

This is the hallmark of a civil commitment statute; punitive confinements do not terminate when the person's mental condition changes. Sexually violent person commitment statutes are like other involuntary civil commitments, and unlike prison sentences, in terms of the justifications for, nature, and duration of confinement. *State v. Carpenter*, 541 N.W.2d 105, 110-11 (Wis. 1995). They are not the "functional equivalent" of criminal proceedings or punishment. *See Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1948 (1994), *discussed in Ursery*, 116 S. Ct. at 2144.

The nature, structure and design of these commitment statutes evidence clear legislative intent to create civil, nonpunitive, remedial statutes. It is wrong to ignore the plain language of the statutes themselves and to speculate that the "real," and sinister, intent of the legislators enacting such statutes was to prolong detention of sexually violent persons past completion of their prison terms so that they could not reoffend. First, such arguments wrongly equate incapacitation with punishment. "[T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citing *Bell v. Wolfish*, 441 U.S. 520, 537 (1979)). Detention of dangerous persons for the purpose of preventing danger to the community is a legitimate regulatory governmental goal that does not constitute punishment. *Salerno*, 481 U.S. at 747. A prime example of nonpunitive detention is the detention of "mentally unstable individuals who present a danger to the public." *Salerno*, 481 U.S. at 748-49 (citing *Addington v. Texas*, 441 U.S. 418 (1979)). If detention for the purpose of preventing the individual from committing harm in the community were necessarily punishment, all involuntary civil commitments would constitute punishment. That is not the law.

More erroneously yet, such arguments confuse legislative intent with motive. This Court has firmly rejected motive arguments:

> Judicial inquiries into [legislative] motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to [the court] forbids [it] lightly to choose that reading of the statute's setting which will invalidate it over that which will save it. "[I]t is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void."

Flemming v. Nestor, 363 U.S. 603, 617 (1960). "The decisions of this Court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *McCray v. United States*, 195 U.S. 27, 56 (1904). The Court shall not undertake to psychoanalyze the subjective intent of a State's laws or its courts; it would be unseemly, misguided and improper to do so. *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 635 (1988). *See also United States v. O'Brien*, 391 U.S. 367, 384 (1968).

Applying the proper analysis and understanding of legislative intent, there is no doubt that States enacting sexually violent person commitment statutes intended to enact a civil, nonpunitive, remedial or regulatory measure. Thus, such statutes are presumed not to be subject to double jeopardy. *See Ursery*, 116 S. Ct. at 2148 n.3. The only remaining question is whether there is the "clearest proof" that such commitments "are so punitive in form and effect as to render them criminal despite [the legislatures'] intent to the contrary." *Ursery*, 116 S. Ct. at 2148.

If the legislative measure serves important nonpunitive goals, the presumption has not been overcome, even if the measure may perhaps also have certain punitive aspects. *Ursery*, 116 S. Ct. at 2148. For example, even though civil forfeitures inflict a loss of property, the nonpunitive goal of such statutes is to encourage property owners to take care in managing their property and not allowing it to be used for illegal purposes; a forfeiture may also abate a nuisance. *Id.* Similarly, here, although sexually violent person commitment statutes inflict a loss of liberty, the aim of that loss of liberty is remedial, not punitive. Like other civil commitment statutes, the purpose of the confinement is to protect the public from the danger posed by the individual's mental condition and to offer treatment for that condition. Sexually violent person commitment statutes encourage sex offenders to accept and actively participate in the sex offender treatment that is offered in prison so that upon release they will not present a danger to the public that necessitates commitment.[10]

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[10]The Wisconsin Supreme Court rejected the argument that because commitment follows service of a criminal sentence, the statute is not truly intended to provide treatment:

> [W]e note that treatment, even specialized treatment directed toward sexual offenders, is currently available in the regular prison setting. For those who have fully availed themselves of treatment opportunities, a chapter 980 petition may be unnecessary. It is only those for whom previous treatment has proved ineffective, as demonstrated by their current diagnosis of a mental disorder that predisposes them to commit violent acts, that chapter 980 commitment will be appropriate. The focus on current mental condition is designed to afford persons with the most persistent problems the greatest help available. This court fails to see how a statute structured to cover only those demonstrated to be most in need of treatment can be characterized as "not serious" in its pursuit of the objective of providing treatment.

United States v. Halper, 490 U.S. 435 (1989), does not counsel that sexually violent person commitment statutes would be punitive and impose an unconstitutional second punishment even if, in addition to their remedial, nonpunitive goals, they also were deemed to serve either retributive or deterrent purposes. In *Ursery*, this Court unequivocally rejected that reading of *Halper*. *Ursery*, 116 S. Ct. at 2145-46 n.2. Under such a reading, "virtually every sanction would be declared to be a punishment: it is hard to imagine a sanction that has no punitive aspect whatsoever." *Ursery*, 116 S. Ct. at 2146 n.2 The presence of some punitive aspects will not render the statute punitive as long as the statute serves important nonpunitive goals. *Id.* at 2148.

In particular, the fact that the legislative measure is linked to criminal activity does not render the measure punitive, as long as that aspect of the measure serves a nonpunitive goal. For example, the fact that a forfeiture applies to proceeds of illegal conduct does not render the forfeiture punishment for the conduct because the forfeiture "serves the additional nonpunitive goal of ensuring that persons do not profit from their illegal acts." *Ursery*, 116 S. Ct. at 2148-49. Similarly, the fact that sexually violent person commitment statutes apply to persons who have committed serious sexual offenses does not mean the goal of the commitment is to punish the person for that act. Rather, the requirement of a criminal offense as a prerequisite to commitment serves the nonpunitive goal of ensuring that only the most dangerous, sexually disordered persons can be committed. The fact that sexually violent person commitment statutes apply to

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State v. Post, 541 N.W.2d 115, 125 (Wis. 1995). The court also found support exists for the legislature's conclusion that effective treatment of sex offenders that can reduce sexual violence does exist, and acknowledged the specialized treatment to be afforded persons committed under the Wisconsin law. *Id.* at 125.

persons who have served prison terms does not mean the goal of the commitment is to punish the person by essentially lengthening the prison term. Rather, application of the statute to such persons targets the statute to those who are most dangerous because they have been offered sex offender treatment in prison and have rejected it or who evidence substantial likelihood to reoffend because the prison experience has not had a deterrent impact on them. Thus, the fact that sexually violent person commitment statutes are "tied to criminal activity" is "insufficient to render the statutes punitive." *Ursery*, 116 S. Ct. at 2149. Similarly, even if these commitment statutes may be said to also serve the purpose of deterrence, that does not render them punitive because civil, as well as criminal, statutes may serve deterrent goals and the deterrent purpose is distinct from any punitive purpose. *Id.*[11]

Ursery teaches that a statute is not punitive merely because it has some punitive aspect, because it serves a deterrent purpose, or because it is linked to criminal conduct. *Ursery* properly focuses the analysis on whether the statute serves important nonpunitive goals. If it does, the presence of other factors will not render the statute punitive. *Ursery* clarifies that the controlling question asks whether a nonpunitive purpose to which the legislative measure may rationally be connected is assignable for the measure and whether the measure appears excessive in relation to that nonpunitive purpose.[12] That approach is

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[11]*Ursery* also noted that civil forfeiture statutes do not require the government to show scienter in order to establish that the property may be forfeited. *Ursery*, 116 S. Ct. at 2149. Similarly, sexually violent person commitment statutes do not require a showing of scienter.

[12]In *Ursery*, the Court drew on the factors it had previously identified in *United States v. Ward* and *Kennedy v. Mendoza-Martinez* as useful in determining whether governmental

equivalent to the approach in *Bell v. Wolfish*, 441 U.S. at 538-39, in which the Court indicated that if the challenged governmental action (here, involuntary commitment) is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment. Only if it is arbitrary or purposeless in relation to the nonpunitive goal may the Court infer that the purpose of the governmental action is punishment. *Id.* at 539. Only if it is arbitrary or purposeless and serves no legitimate nonpunitive goals does the governmental conduct constitute the kind of governmental oppression the Double Jeopardy Clause forbids. Only if it is arbitrary or purposeless and serves no legitimate nonpunitive goals does the statute create the kind of arbitrary and vindictive law the Ex Post Fact Clause prohibits.

Sexually violent person commitment statutes serve the important and legitimate nonpunitive governmental goal of incapacitating dangerous, mentally disordered persons for the purpose of protecting the community and providing treatment to the disordered. *See Addington v. Texas*, 441 U.S. at 426; *United States v. Salerno*, 481 U.S. at 748-49. Commitment under these statutes is reasonably related to the goals of incapacitation and treatment. Commitment cannot be said to be arbitrary or purposeless in relation to these nonpunitive goals because the States have demonstrated that mental disorders or abnormalities that render offenders particularly likely to commit acts of sexual violence can be identified and the likelihood that a particular individual will engage in acts of sexual violence, if not committed, can be predicted with sufficient accuracy

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conduct is impermissible punishment. *Ursery*, 116 S. Ct. at 2148-49. *Ursery* advances the inquiry, however, by clarifying the relative weight of the different factors. *Ursery* holds that the presence of punitive or deterrent factors will not make the statute punitive if the statute has a nonpunitive purpose and its provisions are reasonably related to and not excessive in light of that purpose. *Id.*

that the confinement cannot be said to be arbitrary. *See State v. Post*, 541 N.W.2d 115, 122-24, 126 (Wis. 1995) ("mental disorder" in sexually violent person commitment statute can be given reasonably precise content and persons it encompasses can be identified with reasonable accuracy; although predictions of future dangerousness may be difficult, they are nonetheless attainable); *see also In re Young*, 857 P.2d 989, 1001-04 (Wash. 1993). Treatment for such disorders is available and release is required when the dangerous mental condition abates; thus the commitments cannot be said to be purposeless and it cannot be said that the commitments are excessive in relation to these nonpunitive purposes.

There is no "fundamental principle of justice" or historical practice that compels the conclusion that the States may not first punish all guilty sex offenders because they are culpable actors and then civilly commit those with mental disorders who are predisposed to commit acts of sexual violence and who are particularly dangerous because they have failed to successfully complete treatment or have not been deterred by the prison experience. *See Montana v. Egelhoff*, 116 S. Ct. 2013, 2019 (1996) ("It is not the State which bears the burden of demonstrating that its rule is 'deeply rooted,' but rather [the challenger] who must show that the principle of procedure *violated* by the rule (and allegedly required by due process) is '"so rooted in the traditions and conscience of our people as to be ranked as fundamental"'"). Historically, there has been no consensus on how mentally disordered persons who commit acts of sexual violence should be treated. *See* Albert Deutsch, *The Mentally Ill in America: A History of Their Care and Treatment From Colonial Times*, Columbia University Press (1949); Raquel Blacher, Comment, *Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 Mercer L. Rev. 889 (1995). Today, there is no consensus among the States as to how people with mental disorders who commit criminal acts should be dealt with in

terms of culpability and responsibility or ability and willingness to control behavior. This lack of consensus and lack of consistent historical practice does not mean that the States cannot enact the type of statute at issue here: it means the courts should not override the States' choice.

Critics of these statutes contend that commitment is not a legitimate nonpunitive goal because it prevents the person from committing a crime while confined, just like incarceration in prison does. But this argument wrongly assumes that any attempt to eliminate a harm to the community is punishment. *See DeVeau v. Braisted*, 363 U.S. 144 (1960) (governmental purpose to eliminate corruption on waterfront which included removing exfelons from position of influence was not punishment).

Sometimes whether a legislative measure or governmental action is punishment or not determines whether certain constitutional or procedural due process rights must be afforded. *See, e.g., Allen v. Illinois*, 478 U.S. 364 (1986). *Allen* held that a sexually dangerous person commitment statute, which is civil in nature and design, is not rendered criminal or punitive because the State elects to provide the subject with procedural safeguards like those afforded to criminal defendants, because commission of a sexual crime is a prerequisite to applicability of the statute, because the statute imposes a loss of liberty or because commitment might be to a mental health facility operated by the department of corrections that also houses prisoners in need of mental treatment. None of those attributes rendered the Illinois statute criminal or punitive; none of them render the sexually violent person commitment statutes at issue here criminal or punitive. Indeed, the States should be lauded for providing additional procedural protections because such protections ensure reliable decisions. Moreover, procedural due process protections (including jury trials, right to counsel and proof beyond a reasonable doubt) protect against arbitrary and oppressive governmental conduct. *See Joint*

Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring) (procedure spells much of the difference between rule of law and rule by whim or caprice; "[s]teadfast adherence to procedural safeguards is our main assurance that there will be equal justice under law").

This Court must reject the argument that, although *Allen*-type statutes that impose commitment in lieu of prison are not criminal and do not impose punishment, statutes like the one at issue here, which permit successive punishment and commitment, are. That argument finds no reference point in any constitutional principle. No such rule can be predicated on this Court's statement in *Allen* that, under the statutory scheme at issue there, the State had "disavowed any interest in punishment." *Allen*, 478 U.S. at 370. The Court's description of the *Allen* statute is equally applicable here: neither the *Allen* statute nor the Kansas-type statute embraces an interest in punishment as a justification for the involuntary civil commitment. That description of the statute in *Allen* is not a holding that a State must disavow any interest in punishment--in the sense that it may not first punish the person in the traditional manner--in order to constitutionally commit dangerous, sexually disordered persons.

This Court can invalidate the States' sexually violent person commitment laws only if such laws violate a clear constitutional guarantee. This Court is the ultimate arbiter of constitutional law; it is not the ultimate arbiter of how States should best deal with the complex problems presented by those who commit crimes who also suffer mental disorders that make them especially dangerous to the community. The boundaries of this Court's role are critical. If the Court is wrong and oversteps its boundaries, the nation, and its people, suffer in a way that is far more fundamental and that extends far beyond the context of these cases.

The Double Jeopardy Clause and the Ex Post Facto Clause exist to protect the individual against governmental oppression. Absent such oppression, the Constitution does not prohibit the States from utilizing a variety of measures designed to protect the community from dangerous, mentally disordered persons. Sexually violent person commitment statutes do not amount to governmental oppression because they are civil measures that serve traditional, legitimate, important and nonpunitive purposes--incapacitation and treatment of the dangerous, mentally disordered. Their provisions reasonably relate to those purposes and are not excessive in relationship to those purposes. Sexually violent person commitments are not so punitive in purpose or effect as to be considered punishment or criminal for purposes of the Double Jeopardy or Ex Post Facto Clause. They are constitutional and must be upheld.

CONCLUSION

The judgment of the Kansas Supreme Court should be reversed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF KANSAS,
Petitioner,
v.
LEROY HENDRICKS,
Respondent.

LEROY HENDRICKS,
Cross-Petitioner,
v.
STATE OF KANSAS,
Cross-Respondent.

On Writs of Certiorari to the Supreme Court of Kansas

BRIEF FOR THE AMERICAN PSYCHIATRIC ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF LEROY HENDRICKS

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INTEREST OF *AMICUS CURIAE*

The American Psychiatric Association (APA), with approximately 42,000 members, is the Nation's leading organization of physicians specializing in psychiatry. The APA has participated as *amicus curiae* in numerous cases involving mental-health issues in this Court, including *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996), *Riggins v. Nevada*, 504 U.S. 127 (1992), *Foucha v. Louisiana*, 504 U.S. 71 (1992), *Washington v. Harper*, 494 U.S. 210 (1990), *Allen v. Illinois*, 478 U.S. 364 (1986), and *Addington v. Texas*, 441 U.S. 418 (1979). The APA and its members have a strong interest in ensuring that medical diagnoses not be improperly invoked to support involuntary confinement and that psychiatric hospitalization be reserved for proper care and treatment of patients. The APA accordingly has a strong interest in this case.[1]

STATEMENT

The Kansas Sexually Violent Predator Act provides for the confinement of "sexually violent predators" who are not mentally ill under the normal standards justifying civil commitment. The Kansas Supreme Court, relying on *Foucha v. Louisiana*, 504 U.S. 71 (1992), struck down the statute as a form of preventive detention that impermissibly sidesteps the limits on criminal punishment of convicted offenders. Kansas challenges that holding, relying critically on its asserted interest in treatment. Leroy Hendricks defends the Kansas Supreme Court's holding both under *Foucha* and on the closely related ground that the statute is essentially criminal and so, as applied to him, imposes a second punishment in violation of the *ex post facto* and double jeopardy clauses.

A. The Kansas Act begins by acknowledging that it is designed to reach individuals who do *not* come within the standards governing normal civil commitment: "a small but extremely dangerous group of sexually vio-

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[1] A joint letter from the parties consenting to the filing of this brief has been lodged with the Clerk of this Court. *Amicus* has no parent or subsidiary companies.

lent predators exist who do not have a mental disease or defect that renders them appropriate for [civil commitment]."[2] Unlike "persons appropriate for civil commitment," the Act continues, "sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities." As a result of the high likelihood of "repeat acts of predatory sexual violence," the statute declares, commitment procedures are "inadequate," "the prognosis for rehabilitating sexually violent predators in a prison setting is poor," "the treatment needs of this population are very long term," and appropriate "treatment modalities" are "very different" from those appropriate in regular civil commitment. Kan. Stat. Ann. § 59-29a01.

The Act defines "sexually violent predator" to mean "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence [if unconfined]." Kan. Stat. Ann. § 59-29a02.[3] The qualifying "sexually violent offense[s]" include rape and various sex offenses involving children. "[P]ersonality disorder" is not defined; "mental abnormality" is defined to mean "a congenital or acquired [*i.e.*, any] condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in

[2] The general Kansas civil commitment statute requires that the individual not only have "a severe mental disorder to the extent that such person is in need of treatment" and be "likely to cause harm to self or others," but also that the individual "lack[] capacity to make an informed decision concerning treatment." Pet. App. 19a. ("Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 95-1649.)

[3] In referring to persons who are charged with but not convicted of a criminal offense, the statute later makes clear that it means persons who have been found incompetent to stand trial on the criminal charges or not guilty by reason of insanity. Kan. Stat. Ann. § 59-29a03. This case does not involve such a situation—which raises distinct issues (*see* note 8, *infra*) and is not further discussed here.

a degree constituting such person a menace [to others]." The Act thus requires [1] a sex offense plus [2] a mental condition that makes the person "likely" to commit further sexual offenses. *Id.*

The Act provides for initiation of confinement proceedings only for convicted criminals nearing release. Kan. Stat. Ann. § 59-29a03; *see* note 3, *supra*. The state officials with custody, if they think that the person might meet the "sexually violent predator" standard, are required to notify the Attorney General, whose "prosecutor's review committee" is then responsible for determining whether the standard is met (based in part on an assessment from a "multidisciplinary team"). *Id.* § 59-29a03. The Attorney General (or local district attorney) may then file a petition in court alleging that the person is a sexually violent predator. *Id.* § 59-29a04.

If the court finds probable cause, the respondent/defendant is confined in a secure facility (which may be a county jail) for evaluation by a qualified professional. *Id.* § 59-29a05. A trial is then held (before a jury if called for by the defendant, prosecutor, or judge) in which the prosecutor must prove beyond a reasonable doubt that the defendant is a sexually violent predator. *Id.* §§ 59-29a06, 59-29a07. If the finder of fact finds the standard met, the defendant is committed to "the custody of the secretary of social and rehabilitation services [SRS] for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." *Id.* § 59-29a07. The SRS secretary must keep such persons segregated from other civil committees (since June 1995, in a separate facility); the SRS secretary may, however, arrange for confinement by the prison authorities, who must "house[]" and "manage[]" such persons separately from other offenders. *Id.*

Once committed, the "predator" must be given "care and treatment" that "conform to constitutional requirements." *Id.* § 59-29a09. He must also be furnished an

examination of his mental condition, and a court review of his status, once every year. *Id.* § 59-29a08. If he seeks release at this annual review, and the court finds probable cause to think that the "mental abnormality or personality disorder has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged," he is entitled to a new hearing on continued predator status. *Id.* § 59-29a08.

The Act also authorizes petitions for release outside the annual-review process. If the SRS secretary believes that the "predator" qualifies for release, he must be authorized to file a petition, and a full hearing follows. *Id.* § 59-29a10. A confined "predator" may file for release on his own, without SRS authorization; but while the statute directs that a second such petition should be dismissed without a hearing if there is no evidence of a *changed* condition, it sets no standard for reviewing a first solo petition. *Id.* § 59-29a11. According to the Kansas Supreme Court, release through this last mechanism is "improbable." Pet. App. 8a.

B. 1. Leroy Hendricks, who is 60 years old, has a long history of taking "indecent liberties" with children. In 1984, he pled guilty to two counts of that offense and was sentenced to 5-20 years; the State dropped a third count and did not seek longer imprisonment under the state recidivism statute. In 1994, when Hendricks was about to be released (under parole-like terms), the State petitioned a court to continue Hendricks's confinement under the new Act. Pet. App. 1a-2a; J.A. 5. After evaluations of Hendricks, a trial was held. J.A. 125-361.

As summarized by the Kansas Supreme Court, Hendricks testified

> that his history of sexual involvement with children began with his exposing himself to two girls in 1955, and that he had spent approximately half the time since then in prison or in psychiatric institutions. He explained that when he gets "stressed out," he is unable to control the urge to engage in sexual activity with a child. Hendricks agreed that he is a pedophile and that he is not cured of the condition.

Pet. App. 3a; *see* J.A. 125-91. (Although Kansas intimates otherwise, Hendricks did not testify that he would reoffend if released.) The State's chief psychologist, who examined Hendricks, testified that Hendricks was not mentally ill (J.A. 256) but was a pedophile (J.A. 247); that pedophilia is a "mental abnormality" under the "circular" definition meaning a person having a condition predisposing him to sexually violent offenses (*see* J.A. 263-64); and that Hendricks was "likely" to repeat his sexual activity with children if free (J.A. 248). *See* Pet. App. 3a-4a, 18a-19a.[4] The Kansas Supreme Court later stated that "the State's own evidence is that Henricks was being committed even though he does not suffer from mental illness." Pet. App. 20a. A psychiatrist called by Hendricks testified that the research literature showed only a small drop in reoffense rates from treatment of sexual offenders and that psychiatrists and psychologists cannot predict whether an individual is more likely than not to engage in an act of sexual predation. Pet. App. 4a.

Hendricks was found to be a sexually violent predator and committed to the custody of SRS, which sent him to the Larned State Hospital. As of October 1994, the State had not hired "professionals specifically dedicated to a treatment program for sexually violent predators." Pet. App. 4a. *Cf.* J.A. 389-455 (habeas proceeding, in August 1995, on the treatment then available).

2. On appeal, the Kansas Supreme Court held that the Act violates the substantive due process command of the federal Constitution, relying on this Court's 1992 decision in *Foucha*. In its "majority opinion" (Pet. App. 21a), the Kansas court concluded that the Act's purportedly

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[4] The State's psychologist agreed that—just as an alcoholic, though not "cured," cannot be predicted to reoffend (because control is possible)—"simply by giving a diagnosis of pedophilia, you aren't saying that a person would re-offend in the future." J.A. 272.

civil confinement must rest on "clear and convincing proof of mental illness *and* dangerousness": it is not enough to have " 'committed a criminal act' " and have " 'an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment.' " Pet. App. 12*a* (quoting *Foucha*, 504 U.S. at 82). The Kansas statute does not require (and Hendricks concededly does not have) a "mental illness." Pet. App. 19a-20a. The court therefore held the Act invalid.[5]

In reaching that conclusion, the Kansas court construed the Kansas legislature's purposes as follows:

> It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent.

Pet. App. 15a. In light of the Act's declaration that the designated "predators" are not amenable to the treatments provided through normal civil commitment, the court said, "the provisions of the Act for treatment appear somewhat disingenuous." *Id.* at 15a. The court added: "It is clear that the primary objective of the Act is to continue incarceration and not to provide treatment." *Id.* at 16a. The court also noted "that the legislature has provided the State with other options" to confine a person like Hendricks—*e.g.*, maximum sentences; consecutive (as opposed to concurrent) sentences; or tripling of sentences under the recidivism statute. *Id.* at 16a.

SUMMARY OF ARGUMENT

Under the governing substantive due process principles most recently stated in *Foucha*, confinement under the Kansas Act must be justified as a criminal sanction, as

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[5] The Kansas Supreme Court relied in part on a federal district court decision striking down Washington's sexual predator statute, which is similar to the Kansas Act, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995). The Supreme Court of Washington had earlier upheld the Washington statute. *In re Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993).

preventive detention, or as a *parens patriae* measure to provide care and treatment. But, given Hendricks's prior criminal punishment for his only acts, which pre-date the Kansas Act, his confinement could not be deemed criminal without violating the double jeopardy and *ex post facto* clauses of the Constitution. Nevertheless, the criminal character of the Kansas Act is strong, and neither the highly limited categories of permitted preventive detention nor the traditional standards for *parens patriae* commitment of the mentally ill encompass the Kansas Act. Far from providing an optional alternative to criminal remedies, the Act improperly creates an essentially indefinite involuntary extension of criminal incarceration.

The structure of the Kansas Act, including its predication on a criminal act and its exclusive remedy of secure confinement, give it a strong criminal cast. So, too, does the fact that Kansas has not disavowed any interest in criminal punishment of the conduct targeted by this Act. The State's plain interest is in simple involuntary incapacitation of certain convicted criminals. But that interest is a traditional criminal aim, one that could in fact be served still more effectively if Kansas wished. It cannot be deemed non-criminal, when standing alone, without fundamentally undermining the tradition of tight limits on preventive detention in our Nation and allowing an end-run around the constitutional bars on multiple and retroactive punishment. This Court's decision in *Allen v. Illinois*, 478 U.S. 364 (1986), did not authorize such a breach of basic principle, because the petitioner was unquestionably in need of treatment for a psychosis and the State had disclaimed its punitive interest and otherwise put forward a facially well-grounded *parens patriae* interest.

The Kansas Act cannot be upheld as a form of preventive detention under the decisions authorizing limited pretrial confinement as an adjunct to imminent criminal processes or involving special governmental powers in times of war or other extraordinary contexts. Nor, given the uncertainties of relevant mental-health predictions of violence, can the Kansas Act be analogized to a quarantine for a known contagious disease. Validity of the

Kansas Act would instead require a general state power to confine people indefinitely based on predictions that they would "likely" cause serious harm. Such a power has never been approved by this Court and would threaten our most basic traditions of liberty.

The Kansas Act, implicitly recognizing those traditions, tries to wrap itself in the special tradition of civil commitment of the mentally ill, but the State has missed the essential point behind that tradition. "Mental illness" can mean different things for different purposes, but for purposes of involuntary confinement under this traditionally distinctive authority, the critical condition is an impairment that supports a well-grounded *parens patriae* interest in the individual's care and treatment. Whatever the precise limits on such an interest—whether the individual's incompetence is a prerequisite, or whether even a competent individual may be subject to a *parens patriae* state intervention when truly for his or her good—the requisite *parens patriae* interest is lacking here.

Hendricks evidently suffers from no incompetence to care for himself or to make rational decisions; and his risk of committing another sex offense is precisely that, a risk. Given the distinctly limited knowledge of available appropriate treatments and their effectiveness, the essentially indefinite confinement of persons like Hendricks cannot fairly be deemed in *their* interest. The Kansas Act therefore cannot rest on the *parens patriae* interest it invokes, but should candidly be assessed as a public-safety measure—one that would vastly expand the categories of permitted preventive detention even when criminal remedies are available to address the targeted problem.

ARGUMENT

THE CONFINEMENT OF HENDRICKS UNDER THE KANSAS STATUTE WAS UNCONSTITUTIONAL BECAUSE IT LACKED AN ADEQUATE NON-CRIMINAL BASIS

"In our society liberty is the norm . . . ." *United States v. Salerno*, 481 U.S. 739, 755 (1987); *see Foucha*, 504 U.S. at 83. And "[f]reedom from bodily restraint has

always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha*, 504 U.S. at 80. Thus, commitment under the Kansas statute involves a "massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *Vitek v. Jones*, 445 U.S. 480, 491 (1980). As Justice Kennedy summarized the interests at stake in his dissent in *Foucha*, "incarceration of persons is . . . one of the most feared instruments of state oppression and . . . freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments." 504 U.S. at 90.

Given these stakes, the Court in *Foucha* made clear that the permissible grounds for stripping someone of the core freedom to move about are distinctly limited. *Id.* at 80.[6] Confinement is permissible as a sanction for violating a valid criminal law proscribing conduct. *Id.* Confinement has also been narrowly permitted, as a form of preventive detention, to protect against a danger presented by the individual—but only in very limited circumstances. *Id.* at 81-83. And confinement is permissible to care for the mentally ill. *Id.* at 80.

Unlike Louisiana in *Foucha*, Kansas here cannot even begin to defend its regime by characterizing it as a proper *criminal* sanction for those like Hendricks. *Compare Foucha*, 504 U.S. at 90-102 (Kennedy, J., dissenting)

[6] State actions that are aimed specifically and directly at depriving an individual of what is virtually the definition of "liberty"—freedom from bodily restraint—would seem more immediately intrusive than virtually any rule that "merely" proscribes particular *conduct* (*e.g.*, use of birth control) but otherwise leaves an individual free to engage in other activities. Given that even such restrictions on conduct are sometimes subject to strict scrutiny, it is hard to see why a lesser standard should govern constitutional analysis of state action directed specifically at indefinitely locking up an individual in a "secure" facility, where he is separated from family and friends, stripped of normal employment and other life opportunities, and subjected to the restrictive rules of institutions. Traditional civil commitment—based on *parens patriae* interests and typically short term—readily satisfies strict scrutiny (if that standard applies), because it serves compelling interests through narrowly drawn means.

(confinement under Louisiana statute, based on criminal act not already punished, may be valid as *criminal* measure); *cf. id.* at 123-24 & n.17 (Thomas, J., dissenting). Hendricks has already been criminally punished, under pre-existing statutes, for the only conduct that triggers the new confinement regime: certain sex offenses. The addition of further criminal confinement for that conduct, based on a statute enacted after the conduct, would violate both the double jeopardy and *ex post facto* clauses of the Constitution.[7]

For the Kansas statute to pass muster, then, it must fit into either of the two permissible justifications for non-criminal confinement. The Kansas Act, however, in providing for indefinite confinement unrelated to criminal proceedings on a showing of "likelihood" of future offenses, does not come within the narrow categories of preventive detention approved by this Court. Likewise, Hendricks's confinement under the Kansas Act cannot be justified, under present knowledge, as an exercise of Kansas's *parens patriae* power to care for the mentally ill.

[7] The only difference between the original offense and the new "sexually violent predator" standard is a status (a potential for future acts), not any act. *See* State Br. in Kansas Supreme Court at 24 (only element additional to prior sexual act is a "current mental status"). The Constitution does not permit criminal punishment of status. *See Foucha*, 504 U.S. at 80; *Powell v. Texas*, 392 U.S. 514, 532-33 (1968) (plurality); *id.* at 542-43 (Harlan, J., concurring) ("Punishment for a status is particularly obnoxious . . . because it involves punishment for a mere propensity, a desire to commit an offense . . . . This is a situation universally sought to be avoided in our criminal law . . . ."); *Robinson v. California*, 370 U.S. 660 (1962). Thus, even aside from any "lesser included offense" analysis, the Kansas Act punishes the same offense as the previously punished offense and does so, in this case, for an offense that pre-dates the new Act. That result is impermissible under double jeopardy principles. *See Schiro v. Farley*, 114 S. Ct. 783, 789 (1994); *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1941 n.1 (1994); *id.* at 1952-53 (O'Connor, J., dissenting). It is also impermissible under *ex post facto* principles. *See California Dep't of Corrections v. Morales*, 115 S. Ct. 1597, 1601 (1995); *Collins v. Youngblood*, 497 U.S. 37, 40 (1990); *Miller v. Florida*, 482 U.S. 423, 430 (1987).

Under substantive due process principles, therefore, Hendricks's involuntary civil confinement is invalid.[8]

The same conclusion of invalidity can be reached by another, though ultimately similar, route. Confinement under the Kansas Act violates Hendricks's double-jeopardy and *ex post facto* rights if it is criminal in character. *See* note 7, *supra*. This Court has repeatedly insisted on looking beyond labels in determining the criminal or civil character of a state imposition. Here, the insufficient grounding of the Act in *parens patriae* interests or in the narrow bases of permitted preventive detention render the Act ultimately criminal under familiar standards.[9]

[8] Statutes that provide for voluntary alternatives to valid criminal sanctions, as well as those which apply to persons who successfully (and voluntarily) raise an insanity defense, would require a different constitutional analysis, taking into account the general validity of openly criminal sanctions in such cases.

[9] In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), the Court defined the analysis as follows: "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it apears excessive in relation to the alternative purpose assigned . . . ." (footnotes omitted). *See Schall v. Martin*, 467 U.S. 253, 264, 269 (1984); *Bell v. Wolfish*, 441 U.S. 520, 534 (1979). The Kansas Act involves a severe affirmative restraint (confinement) that historically has been regarded as punitive, except under the special conditions identified in *Foucha* (*parens patriae* and narrow preventive detention), and that serves the criminal purpose of specific deterrence (*i.e.*, incapacitation); and the predicate sex offenses are by definition crimes, typically requiring scienter. That the Kansas scheme appears criminal in all of those ways should trigger a heavy burden of establishing a weighty non-criminal alternative basis.

In contexts not involving confinement, such as forfeiture of property or imposition of penalties, the Court has, in similar fashion, asked whether the legislature intended the sanction to be civil and, if so, "whether the statutory scheme was so punitive either in purpose or effect as to negate [the legislature's] intention to establish a civil remedial mechanism." *United States v. Ursery*,

A. The State's Confinement Scheme Has a Strongly Criminal Character

1. The basic features of the Kansas Act, and related Kansas law, lend the Act a strongly criminal cast. A crime is the essential precondition for application of the Act. Only the prosecutor, representing the State, can bring the action, which then has all the outward appearance of a criminal trial. The proceeding is aimed at placing the defendant in "secure" confinement, which may actually be under the control of the state prison authorities. No discretion is vested in non-correctional authorities to make individualized judgments about less restrictive alternatives to suit the individual's medical needs. And, at least at the time of Hendricks's initial confinement, the Kansas Supreme Court concluded, no significant treatment was taking place in the secure facility. Pet. App. 16a.

Normal civil commitment of the mentally ill, in contrast, is not predicated on a criminal act (even when "danger" must be proved). Civil commitment proceedings, moreover, are not under prosecutors' control, but commonly are initiated by mental-health professionals or family members, *i.e.*, those with an expected genuine interest in the individual's welfare. *See* S. Brakel *et al.*, *The Mentally Disabled and the Law* 31-33 (3d ed. 1985). And civil commitment places individuals in the care of mental-health professionals (rather than correctional authorities), typically leaving substantial treatment discretion in their hands to decide on appropriate less restrictive alternatives for particular individuals.

Kansas also has not in any meaningful way disclaimed an interest in criminal punishment of persons like Hendricks. The Kansas Act does not route individuals into its proceedings as an *alternative* to criminal measures:

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116 S. Ct. 2135, 2142 (1996) (internal quotation marks omitted); *see Kurth Ranch*, 114 S. Ct. at 1953 (O'Connor, J., dissenting); *United States v. Halper*, 490 U.S. 435 (1989); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984); *United States v. Ward*, 448 U.S. 242, 249 (1980). This formulation also focuses on non-criminal purposes, which might be less difficult to establish for state measures short of bodily confinement.

criminal charges are not dropped for those subjected to the present regime; instead, confinement occurs *after* service of the criminal sentence for the predicate sex offense (except in cases of insanity acquittals or incompetence to stand trial, not involved here). Moreover, Kansas continues to impose criminal sanctions on the very conduct that the new Act targets: following the *M'Naghten* test for insanity, Kansas holds individuals criminally responsible for their criminal acts without regard to the sort of volitional ("irresistible impulse") impairments invoked by the present Act. *See* Pet. App. 45a (insanity defense available only if defendant "does not know the nature and quality of his act or where he does not know right from wrong with respect to that act"). Under Kansas law, therefore, there is no question that persons like Hendricks *are* criminally responsible for their acts, because they have a rational appreciation of the choices they face and the rightness or wrongness of those choices. *See* J.A. 141, 156-58, 160, 166, 172, 176, 184, 185 (Hendricks testimony); *see also* Kan. Stat. Ann. § 21-4716 ("predatory sex offender" receives *enhanced* criminal sentence).[10]

2. The intent behind the Kansas Act, far from a *parens patriae* purpose focused on serving the interests of those subject to it, unmistakably focuses on incapacitation of such criminals to neutralize their potential for doing harm to others. The label "predator" connotes a purposeful actor to whom the State's attitude is hostility and a desire to restrain for others' sake, hardly empathic concern. The Attorney General of Kansas, testifying in support of the Act, never mentioned any interest in treatment, but instead touted the law as providing for continued "incarceration":

> Most new laws against criminal conduct tend to provide punishment after the victimization has occurred.

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[10] The State of Washington follows the same test for insanity, requiring cognitive rather than volitional incapacity; that is, Washington requires that the defendant be unable "to perceive the nature and quality of the act with which he is charged" or "to tell right from wrong with reference to the particular act charged." Wash. Rev. Code Ann. § 9A.12.010.

> Senate Bill 525 will act prospectively and be preventative of criminal conduct and not just punitive. You have a rare opportunity to pass a law that will keep dangerous sex offenders confined past their scheduled prison sentence. As I am convinced none of them should ever be released, I believe you, as legislators, have an obligation to enact laws that will protect our citizens through incapacitation of dangerous offenders.

J.A. 468-69. This is the language not of *parens patriae* concern, but of intent to continue criminal imprisonment.

Incapacitation (or specific deterrence) of the defendant is, along with retribution and general deterrence, a well-established purpose of criminal law. *See* 4 W. Blackstone, *Commentaries* *11-12 (punishment serves "as a precaution against future offences" by, for example, "the amendment of the offender himself" or "depriving the party injuring of the power to do future mischief"); *id.* at *249; *Montana v. Egelhoff*, 116 S. Ct. 2013, 2020 (1996) (plurality) (*criminal*-law rule "also serves as a specific deterrent, ensuring that those who prove incapable of controlling violent impulses while voluntarily intoxicated go to prison"); *Foucha*, 504 U.S. at 99 (Kennedy, J., dissenting); 18 U.S.C. § 3553(a)(2)(C). Indeed, in *Specht v. Patterson*, 386 U.S. 605 (1967), this Court concluded that a state sex-offender statute inflicted "criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm." *Id.* at 608-09 (footnote omitted); *see United States v. Brown*, 381 U.S. 437, 458 (1965) ("One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.").

A state measure predicated on criminal conduct and resting exclusively on an interest in indefinite preventive incapacitation of the offender must generally be on the "criminal" side of the constitutional ledger. Otherwise, as *Foucha* warned, little would be left to the general rule that criminal acts by competent adults are left to the criminal process (with its double-jeopardy, *ex post facto*, and other restrictions) under the Constitution. 504 U.S. at 82-83. If preventive incapacitation based on criminal conduct, standing alone, counted as a civil purpose, then any person for whom a criminal act and dangerousness could be proved—as was assumed, for example, in the substantive due process portion of *Foucha*—could be locked up until no longer dangerous. Such a result is hardly consistent with the tight limits on civil preventive detention, and constraints on multiple and retroactive punishment, recognized by this Court.

3. If the Kansas Act serves traditionally criminal purposes and targets acts that Kansas would criminally punish, it is also clear, as the Kansas Supreme Court observed, that additional, openly criminal measures are available to pursue still further the public-safety purposes served by the Act. A State may seek to sentence an offender to the full authorized sentence rather than plea bargain for shorter confinement, may seek consecutive rather than concurrent sentences, or may invoke recidivism statutes to lengthen imprisonment; it may enact longer sentences or further recidivism statutes if necessary and may use criminal proscriptions on attempts and threats to attack incipient misconduct; and it may use parole or probation to place severely enforced restrictive conditions on post-release behavior. *See* Pet. App. 16a. In the present case, indeed, Kansas apparently has powers of supervision over Hendricks, who was released after 10 years of a 5-20 year sentence under a form of parole. *See* Kan. Stat. Ann. § 22-3718.[11] What the Court said in *Foucha* about inmate violence is equally applicable here (504 U.S. at 82):

> [T]he State does not explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways

[11] Even outside the criminal context, means well short of confinement—*e.g.*, court orders to avoid schools or children, community-notice provisions—may be available as well.

of dealing with patterns of criminal conduct. These are the normal means of dealing with persistent criminal conduct.

4. In *Allen v. Illinois*, which involved a statute (Illinois' Sexually Dangerous Persons Act) that had some of the characteristics that give a criminal cast to the Kansas scheme, this Court rejected the defendant's claim that the proceeding was criminal (for purposes of the self-incrimination clause). 478 U.S. 364. The confinement of Hendricks under the Kansas Act, however, is significantly different. The key factors that supported the non-criminal assessment in *Allen* are missing here.

First, *Allen*, unlike the present case, involved an individual who was severely mentally ill in the classic sense relevant to traditional civil commitment, *i.e.*, he had schizophrenia, a fact stressed by the State.[12] As a result, the State's asserted interest in offering truly needed treatment was entirely plausible on the facts of *Allen*, and there was no other record showing that, more generally, the State's asserted interest in treatment was hollow. Second, unlike Kansas, the State in *Allen* had "disavowed any interest in punishment" (478 U.S. at 370)—and simultaneously reinforced its non-criminal, *parens patriae* interests—by the very structure of the statute. Unlike Kansas here, the State in *Allen* was required to "elect between a criminal prosecution and a sexually dangerous persons proceeding," dropping any criminal charges once the election of the latter option had been made, thus providing for "treatment in lieu of prosecution." Brief for Respondent Illinois in *Allen* at 12; *see Allen*, 478 U.S. at 369 n.5. And the Illinois statute, unlike the Kansas Act, provided for conditional release under the supervision of the State's mental-health authorities. *Id.* at 369 n.4. In *Allen*, then, this Court concluded that, not only were criminal interests disavowed by the State, but the State's public-safety concerns were no more than a "supplement [to] its *parens patriae* concerns." 478 U.S. at 373. In this case, the Kansas Supreme Court properly rejected such a view of the Kansas Act. Pet. App. 16a.

[12] *See Allen*, 478 U.S. at 366 (State's psychiatrists testified that Allen was "mentally ill"); Brief for Respondent Illinois in *Allen* at 3 & 11 n.3 (Allen "was diagnosed as psychotic, or 'out of touch with reality', and suffering from a schizophrenia characterized by aggressive and abnormal behavior"; "diagnosed as being schizophrenic"); *id.* at 13 n.4 (insisting that Illinois statute was different from "[s]tatutes which do not require proof of mental illness").

B. The State's Confinement Regime Does Not Fall Into One of the Narrow Categories of Permitted Preventive Detention –

In *Foucha*, this Court confirmed that a detention regime designed entirely to prevent potential harm to others has been upheld only in narrow circumstances. 504 U.S. at 80-82. Thus, preventive detention has been upheld when brief in duration *and* tied closely to an impending criminal proceeding. *See, e.g., United States v. Salerno*, 481 U.S. 739 (1987); *Schall v. Martin*, 467 U.S. 253 (1984) (additional factor: power over juveniles); *cf. County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (detention of crime suspect before arraignment). The Kansas Act in no sense provides such a short-term, pretrial adjunct to the criminal process: it provides for indefinite confinement where no criminal proceeding is permissible. The Kansas Act thus serves as an evasion of the limits on the criminal process, not as an adjunct to that process.

Preventive confinement has also occurred with this Court's approval, or at least without its disapproval, in certain extraordinary contexts—in times of war or insurrection (*Ludecke v. Watkins*, 335 U.S. 160 (1948); *Moyer v. Peabody*, 212 U.S. 78 (1909)) and with respect to aliens in the immigration context (*Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Carlson v. Landon*, 342 U.S. 524, 537-42 (1952)). But special, self-limiting government powers exist in those contexts. No such power can be called on to justify the Kansas Act, which would require a general state power to confine individuals for preventive purposes—a power that would transform our tradition of liberty.

A general police power *would* seem to be available to confine individuals where unavoidably necessary to prevent an imminent, known hazard, such as the spread of highly contagious diseases. *Cf. Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory vaccination). But the most presumptively valid exercises of such power involve situations where the threat is compellingly clear, the harm is effected through means other than voluntary human action, and the detention is the least restrictive means to address the urgent problem. The Kansas Act cannot come within such a standard without so loosening the standard as to leave few limits on preventive detention.

In addition to the fact that human action is the mechanism of harm in the present context, there is, in the area of psychiatric prediction of violence by the mentally ill, nothing like the level of certainty applicable to a contagious disease. This Court has noted as much. *See Heller v. Doe by Doe*, 113 S. Ct. 2637, 2644 (1993) ("diagnosis of mental illness is difficult" and "psychiatric predictions of future violent behavior by the mentally ill are inaccurate"); *Addington v. Texas*, 441 U.S. 418, 429 (1979) ("Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous."). And, as relevant here, the research literature shows that mental health professionals can generally make sound expert predictions of violence only as matters of probabilities, which are "rarely above 50%" and often substantially less. Grisso & Appelbaum, *Is It Unethical to Offer Predictions of Future Violence?*, 16 L. & Human Behavior 621, 626 (1992).[13] With respect to pedophilia

[13] *See, e.g.*, Menzies *et al.*, *The Dimensions of Dangerousness Revisited*, 18 L. & Human Behavior 1, 25 (1994) (despite recent improvements in knowledge, "on the critical question—namely, whether experts or instruments can reliably and validly differentiate between potentially violent and innocuous human subjects—the overwhelming body of empirical evidence remains highly equivocal"); J. Monahan & H. Steadman eds., *Violence and Mental Disorder* (1994). Cases under the Kansas Act do not involve what may be the different situation of predicting immediate violence in psychosis-based emergencies.

particularly, the rates of sex-offense recidivism documented in studies vary widely, seemingly all below 50%.[14]

Kansas, presumably recognizing the problems of prediction, has required no more than that the defendant be "likely" to engage in sexual offenses some time in the future. Kan. Stat. Ann. § 59-29a02. No more was found by the jury (J.A. 359) or asserted by the State's expert (J.A. 248, 254) in this case. Consistent with the common meaning of this standard, the State's expert twice confirmed his understanding that it required only that Hendricks have a 50% probability of committing a future act of sexual violence. J.A. 260-61, 279. *See also* page 28 & note 25, *infra* ("safe" standard for release).

In the normal civil-commitment context, where the essential condition for commitment is a *parens patriae* interest in providing care and treatment (typically short-term) for the good of the patient, there often is a secondary "dangerousness" requirement, which is subject to "clear and convincing" proof. *See Addington, supra*. If no *parens patriae* purpose is present, and prediction is the sole basis for confinement (in a "secure" facility), "likely harm" as a ground for detention is unprecedented, and itself dangerous to the principles of a free society. If "likely harm" were enough, detention might be justified for any number of classes of individuals, such as alcoholics and substance abusers, whose characteristics are significantly associated with violence (and with difficulties of being "cured").[15] Moreover, if courts were required to focus on

[14] The leading survey of the literature, aside from noting the grave methodological limits on existing studies and the likely underreporting of recidivism, summarizes a wide range of sex-offense recidivism rates—from 6% to 40%. *See* Furby, Weinrott, & Blackshaw, *Sex Offender Recidivism: A Review*, 105 Psychological Bull. 3, 12-19 (1989) (studies separately focusing on pedophiles: numbers 5, 6, 14, 22, 27, 30, 33, 38).

[15] "A large number of crimes, especially violent crimes, are committed by intoxicated offenders; modern studies put the num-

making accurate predictions, they would risk being faced with overt reliance on various human characteristics that might be asserted to provide statistically significant information about offense rates and yet raise independent legal and other issues. *See, e.g.*, Furby *et al., supra*, at 5, 27; Swanson, *Mental Disorder, supra,* at 120-21. Upholding the Kansas Act *without* a well-grounded *parens patriae* interest thus would dramatically break with our Nation's strong tradition against preventive confinement based on uncertain predictions.

C. The State's Asserted *Parens Patriae* Interest in Treatment Is Not Well Grounded and So Does Not Alter the Character of the Confinement

1. This Court made clear in *Foucha* that civil confinement, when not falling within one of the narrow categories of permissible detention for public safety alone, must be based on "mental ill[ness]." 504 U.S. at 80; *see id.* at 94 (Kennedy, J., dissenting) ("beyond question" that "in civil proceedings the Due Process Clause requires the State to prove both insanity and dangerousness by clear and convincing evidence"). The Kansas Act seeks to cloak itself in this traditional state power. But mere invocation is not enough to come within this distinctive power, whose scope must be defined by the tradition and the fundamental conception of personal autonomy behind it.

Historically, the essential condition for confinement of the mentally ill has been a *parens patriae* justification, even when supplemented by police-power interests in protecting the public. *See Foucha*, 504 U.S. at 96 (Kennedy,

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bers as high as half of all homicides, for example." *Montana v. Egelhoff*, 116 S. Ct. at 2020 (plurality) (citing Third Special Report to the U.S. Congress on Alcohol and Health from the Secretary of Health, Education, and Welfare 64 (1978) and Note, *Alcohol Abuse and the Law*, 94 Harv. L. Rev. 1660, 1681-1682 (1981)). The research literature demonstrates that substance abusers present very high risks of violence and recidivism. *See* Swanson, *Mental Disorder, Substance Abuse, and Community Violence: An Epidemiological Approach*, in J. Monahan & H. Steadman eds., *Violence and Mental Disorder* at 101-36 (1994).

J., dissenting) ("[i]n the civil context, the State acts in large part on the basis of its *parens patriae* power to protect and provide for an ill individual, while in the criminal context, the State acts to ensure the public safety").[16] "Mental illness" as a ground for involuntary confinement may require, as a prerequisite, that the individual lack rational capacity to make his own treatment decisions; more broadly, it may justify a confinement even of a competent individual when otherwise truly for his own good. But whichever standard governs—and the Court need not decide here, because neither standard is met, as explained below—confinement based on "mental illness" must rest on the State's *parens patriae* power to override the individual's autonomy to act for his own good.

When a State invokes this power, the reality of the confinement must support the claim that it is in the individual's interest. If "mental illness" were freely subject to legislative definition (through new terms like "mental abnormality" or otherwise), or if anyone "crazy" or "sick" enough to engage in repeated serious offenses could be civilly confined for that reason, the limits on deprivations of liberty to protect the public safety would quickly disappear. When an assertion of a *parens patriae* interest is not well grounded, the State either is acting to punish the individual, and thus has to meet the requirements for a valid criminal sanction, or is acting to serve *others'* interests by preventive detention, and thus has to meet the stringent standards for such action—neither of which Kansas can do.[17]

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[16] *See also Allen*, 478 U.S. at 373 (public-safety concern "supplements" the State's *parens patriae* concerns in commitment for treatment); *Addington*, 441 U.S. at 426 (noting that *parens patriae* basis is present in normal civil commitment, along with police power); *Mentally Disabled and the Law* 24-25; 1 M. Perlin, *Mental Disability Law* §§ 2.02-2.05 (1989).

[17] This is not a case where history resolves the constitutional issues, because sex psychopath laws like the Kansas Act do not reflect a long-established societal judgment that effectively permanent civil preventive confinement of already-punished offenders, based only on "likely" harm, is reasonable. Many States enacted

2. Just as state legislative dictates cannot control the standard of "mental illness" justifying involuntary confinement, so, too, the standard cannot be controlled by the categories set forth in the APA's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) (*DSM-IV*) (or in the various editions of the related *International Classification of Diseases*). Such catalogues include a vast range of disorders that vary widely in severity and type of impairment (*e.g.*, cognitive, mood, sexual, eating, learning, sleep, adjustment, etc.). The classification schemes are developed and periodically altered, through comprehensive field trials, research, and analysis, to serve diagnostic and statistical functions, forming a common (and always imperfect) language for gathering clinical data and for communication among mental health professionals. *DSM-IV* at xv-xxv. These schemes are designed to identify the full range of mental disorders, each (according to the inevitably imprecise definition)

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sex psychopath laws during the middle decades of this Century, but they evidently were not put to wide-spread use (except in California); sometimes enacted at times of public panic and then quickly forgotten, they were generally justified by the asserted, and often well-motivated, *parens patriae* interest in providing effective and caring treatment as an alternative to criminal punishment; yet by the 1970s such laws had been widely repealed as a failed experiment, with the recognition that effective and truly needed treatment was not meaningfully available. *See* Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. Crim. L., Criminology, & Police Sci. 215, 225 (1960); *Mentally Disabled and the Law* 739-43; *see generally* Group for the Advancement of Psychiatry, *Psychiatry and Sex Psychopath Legislation: The 30s to the 80s* (1977); ABA, *Criminal Justice Mental Health Standards* 455-61 (1984) (Standard 7-8.1, urging repeal of remaining sex psychopath laws; discussing history). This experience is not enough to justify what amounts to a regime of preventive detention, particularly for convicted offenders, in the absence of available, effective, needed treatment. This Court's decision in *Minnesota v. Probate Court*, 309 U.S. 270 (1940), which rejected vagueness, equal-protection, and procedural-due-process challenges to a sex psychopath law (whose application "was not triggered by a criminal conviction," *Specht*, 386 U.S. at 610 n.3), is not to the contrary.

> a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.[18]

Such comprehensive classification schemes are not restricted to identifying those persons who warrant involuntary treatment, let alone confinement. Nor are they designed to identify those subject to various legal standards, such as those for involuntary confinement. Thus, the authors of *DSM-IV* caution that "[i]n most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a 'mental disorder,' 'mental disability,' 'mental disease,' or 'mental defect.'" *DSM-IV* at xxiii. The authors further caution that "a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder." *Id.* Not all individuals who come within a *DSM-IV* category suffer an impairment that diminishes their autonomy, much less one justifying involuntary confinement for the individual's own good.

Indeed, this Court held in *Foucha* that "antisocial personality disorder"—one of the "personality disorders" catalogued in *DSM-IV*, characterized by "a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years" (*id.* at 649)—is not the sort of "mental illness" that permits a *parens patriae* civil commitment.

> [T]he State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment,

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[18] *DSM-IV* at xxi. The definition adds that "[n]either deviant behavior (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfuncton in the individual." *Id.* at xxii.

> he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.

Foucha, 504 U.S. at 82-83. The same circularity problem would be present if the Constitution allowed confinement based on a "mental abnormality" whose defining characteristic was a pattern of "abnormal" acts. *See* Pet. App. 19a (State's witness noted circularity of statutory definition of "mental abnormality").[19] Such a standard for "disorder" would substantially destroy any limits on state power to provide for preventive civil detention, because it would not "enable a court to differentiate those who suffer such disorders from those who simply want to engage in proscribed conduct." Schopp & Sturgis, *supra*, at 451.

3. Kansas has effectively set the limits on its own *parens patriae* interest, through its civil commitment laws: Kansas does *not* displace autonomous decisionmaking by subjecting individuals to involuntary confinement under such laws unless they lack reasonable capacity to make

[19] *See* Schopp & Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 Behav. Sci. & L. 437, 451 (1995) (allowing confinement based on "any emotional state that motivated deviant conduct, including strong desires to engage in such behavior, . . . would . . . include virtually anyone who engages in seriously antisocial conduct"). The American Law Institute, in adopting its insanity-defense standard as part of the Model Penal Code, was careful to note that the required " 'mental disease or defect' do[es] not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." *Model Penal Code* § 4.01(2) (1962).

their own treatment decisions. *See* Kan. Stat. Ann. § 59-2902(e), (h); note 2, *supra*. This "competence" standard for *parens patriae* confinement is also embodied in the APA's *Guidelines for Legislation on the Psychiatric Hospitalization of Adults*, 140 Amer. J. Psychiatry 672 (1983), which require lack of "capacity to make an informed decision concerning treatment," *i.e.*, inability "to engage in a rational decision-making process regarding such hospitalization or treatment, as evidenced by inability to weigh the possible risks and benefits." *Id.* at 673.[20] This view is reflected as well in the historical definition of "lunatics" (subject to involuntary commitment) as persons lacking "reason," that is, "incapable of conducting their own affairs." 1 W. Blackstone, *Commentaries* *294.[21]

This standard finds its counterpart in Kansas's standard for relieving individuals of *criminal* responsibility under the insanity defense—cognitive impairment, not volitional impairment. *See* page 13, *supra*.[22] The connection

[20] *See* Stone & Stromberg, *A Model State Law on Civil Commitment of the Mentally Ill*, 20 Harv. J. Legis. 59, 64 (1983) ("The Model Law [which led to the APA Guidelines] seeks to put the *patients'* interests first. It therefore rejects the idea that dangerousness is the only valid basis for commitment, and instead makes the provision of treatment the indispensable element justifying commitment. Under the Model Law, *parens patriae commitment* requires that the patient suffers from a severe mental disorder, lacks 'capacity to make a reasoned decision concerning treatment,' is treatable, and is likely to harm himself or others.").

[21] This notion embodies what seems the most familiar commonsense meaning of the phrase "mentally ill." *See* M. Moore, *Law and Psychiatry* 197 (1984): "[T]he mental abilities of perception, memory, imagination, and particularly reasoning are necessary in the acquisition of rational beliefs and in maintaining consistency between belief sets and desire sets. Rationality is one of the fundamental properties by which we understand ourselves as persons, that is, as creatures capable of adjusting our actions as reasonably efficient means to rational ends. Being mentally ill means being incapacitated from acting rationally in this fundamental sense."

[22] This is the traditional common-law standard (*see, e.g.*, 4 W. Blackstone, *Commentaries* *21, *24; *Mentally Disabled and the Law* 709) and, more recently, has been re-established as the insanity-defense standard under federal law (18 U.S.C. § 17) based on the

between the criminal standard and the standard for permissible involuntary civil confinement under a *parens patriae* power is natural, if not inevitable: lack of substantial responsibility for one's own actions has traditionally been the central justification both for excusing criminal liability and for allowing state intervention for the *parens patriae* purpose of taking care of "persons incapable of looking after their own interests." *Zinermon v. Burch*, 494 U.S. 113, 133 (1990). Not surprisingly, an equation of the "mental illness" standard for civil commitment and the criminal-law concept of "insanity" not only has historical roots (*see* 4 W. Blackstone, *Commentaries* *24 (using same term "lunatics" and equating concepts)) but also has sometimes been assumed in this Court. *E.g.*, *Heller*, 113 S. Ct. at 2646; *Foucha*, 504 U.S. at 94 (Kennedy, J., dissenting).

Under this test of the relevant *parens patriae* meaning of "mental illness" for confinement purposes, confinement of Hendricks under the Kansas Act cannot be justified. The statutory "mental abnormality" or "personality disorder" creating a propensity for sex offenses does not demand any impairment of competence—any "[i]mpairment undermining the capacity to direct one's behavior through the process of practical reasoning." Schopp & Sturgis, *supra*, at 450, 455. More particularly, Hendricks's

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widespread recognition that "[t]he line between an irresistible impulse and an impulse not resisted" is indeterminate in practice and profoundly problematic in theory. *APA Statement on the Insanity Defense*, 140 Amer. J. Psychiatry 681, 685 (1983); *see* S. Rep. 98-225, 98th Cong., 1st Sess. 225-29 (1983) (testimony from Professor Bonnie stating: " 'there is no scientific basis for measuring a person's capacity for self-control or for calibrating the impairment of such capacity. There is, in short, no objective basis for distinguishing between offenders who were undeterrable and those who were merely undeterred, between the impulse that was irresistable and the impulse not resisted, or between substantial impairment of capacity and some lesser impairment.' "); *see also Powell v. Texas*, 392 U.S. at 525-26 (plurality); Schopp & Sturgis, *supra*, at 446-47; Morse, *Culpability and Control*, 142 U. Penn. L. Rev. 1587, 1601 (1994); *Mentally Disabled and the Law* 709-19.

pedophilia, like other "paraphilias," presents no such impairment of cognitive abilities. *See DSM-IV* at 522-23. "Neither sexual assault nor the paraphilias, including pedophilia, entail psychological aberration apart from the desire to perform such conduct and the willingness to act on that desire." Schopp & Sturgis, *supra*, at 451 (footnote omitted). Confinement of individuals like Hendricks, then, cannot rest on a *parens patriae* assertion of incompetence such as would justify substituted judgment in the absence of informed consent to treatment.

4. Nor can Hendricks's confinement be justified under a broader *parens patriae* state power simply to act in what is clearly the patient's best interest (notwithstanding a competent refusal of treatment). The ease with which hollow state invocations of treatment interests may mask a real interest in mere incapacitation makes it important to demand a substantial basis in fact for any state claim that an individual's confinement is for the purpose of treatment for his benefit.[23] And in this case, the Kansas Supreme Court concluded that, whatever the State's aspirations, Kansas had essentially no treatment actually available to Hendricks when he was confined.[24] *See Jack-*

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[23] *See* Allen, "Criminal Justice, Legal Values and the Rehabilitative Ideal," in *Crime, Law, and Society* 271, 276-78 (A. Goldstein & J. Goldstein eds. 1971) ("Certain measures, like the sexual psychopath laws, have been advanced and supported as therapeutic in nature when, in fact, such a characterization seems highly dubious. Too often the vocabulary of therapy has been exploited to serve a public-relations function. . . . [T]here is a strong tendency for the rehabilitative ideal to serve purposes that are essentially incapacitative rather than therapeutic in character.").

[24] Pet. App. 15a ("Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. . . . [T]he provisions of the Act for treatment appear somewhat disingenuous."); *cf.* J.A. 392-455 (later hearing on the treatment available at the Kansas institution).

If Hendricks's initial confinement was illegal, and if he had been released at that time, the Kansas Act would not have furnished any evident mechanism for bringing him back into custody to face "sexually violent predator" charges. *See* Kan. Stat. Ann. § 59-29a03

son v. Indiana, 406 U.S. 715, 728 (1972) ("it is problematical whether commitment for 'treatment' or 'training' would be appropriate since the record establishes that none is available for Jackson's condition at any state institution"). More generally, the Kansas Act is not tailored to a real *parens patriae* treatment interest.

A *parens patriae* interest would require an individualized, flexible approach to the provision of treatment, with a range of options available, including hospitalization and outpatient treatment, to serve the individual's needs best. Yet the Kansas statute provides instead for a stark rule of confinement in a secure facility and requires continued confinement until a judge or jury, based on professional testimony, concludes that the risk of recidivism has been so reliably and substantially reduced that the individual is "safe to be at large." Kan. Stat. Ann. §§ 59-29a07, 59-29a08, 59-29a10, 59-29a11.[25] The State seeks a " 'guarantee.' " Kansas Opening Br. 11. Where such a guarantee is impossible, the result is an essentially life-time confinement of a person who, if given the opportunity, presents a substantial chance of living in freedom without relapse (like alcoholics or substance abusers). *See* J.A. 478 (Act "would allow us to keep the sexually violent offenders locked up indefinitely").

In fact, it is just such life-time confinement that Kansas must justify, because the standard of effective treatment demanded by the Kansas Act cannot be met today. Current treatments for pedophilia include various types of psychotherapy, cognitive-behavioral therapies, and pharmacological treatments; and such treatments, in varying degrees and for particular individuals, provide benefits

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(statute providing for initiation of proceedings only as to certain persons prior to release from state custody).

[25] If the evidence in this case was legally sufficient to support initial and continued confinement under the Kansas Act, then the Act's legal requirements, coupled with the natural tendency to be risk-averse in cases like this, effectively set a standard of near-zero tolerance of relapse. *See* J.A. 356, 483, 509, 567.

that make them important to pursue.[26] But they cannot today do what Kansas demands: even when promising, the available treatments are far from proven, for known classes of patients, to be not only safe but also so effective at reducing risk as to lead to release under the Kansas Act. As the GAO recently summarized the current state of learning, "[t]he most optimistic reviews [of research] concluded that some treatment programs showed promise for reducing deviant sexual behavior," but "little is certain about whether, and to what extent, treatments work with certain types of offenders, in certain settings, or under certain conditions." *GAO Report* at 11, 3. *See also* Furby, *et al., supra*, at 27 ("There is as yet no evidence that clinical treatment reduces rates of sex reoffenses in general and no appropriate data for assessing whether it may be differentially effective for different types of offenders."); J.A. 328-29.[27]

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[26] These treatment methods are summarized in the recent General Accounting Office report, *Sex Offender Treatment: Research Results Inconclusive About What Works to Reduce Recidivism* at 20-21 (June 1996) ("*GAO Report*"). *See also* G. Abel & C. Osborn, *Pedophilia*, in 2 G. Gabbard ed., *Treatments of Psychiatric Disorders* ch. 70 (2d ed. 1995); Bradford, *Pharmacological Treatment of the Paraphilias*, in *Review of Psychiatry* vol. 14, at ch. 29 (1995); H. Kaplan & B. Sadock, eds., *Comprehensive Textbook of Psychiatry* 1346-47 (6th ed. 1995).

Psychotherapy in this context seeks to alter behavior through self-understanding. Cognitive-behavioral treatments include, among other techniques, different kinds of therapies designed to create, through psychological or physical means, aversion toward the pedophilic impulses. Pharmacological treatments being studied, some of which are sometimes referred to as "chemical castration," include several medications that dampen the sex drive by reducing testosterone—cyproterone acetate, or CPA (which is not approved for general use in the United States); medroxyprogesterone, or MPA; and leuprolid acetate, or LPA. Another new pharmacological approach, whose mechanism is not understood, seeks to inhibit "serotonin reuptake," through medications that are principally used for obsessive-compulsive disorders and depressions. Surgical castration and psychosurgery, however effective, are highly invasive and would not be ethically condoned in an involuntary procedure.

[27] *See GAO Report* at 3 ("Psychotherapy was generally viewed as not being effective except, in certain cases, when administered in

In sum, the Kansas Act's effort to justify confinement by invoking a *parens patriae* interest in treatment "goes much too far on the basis of too little knowledge." *Powell v. Texas*, 392 U.S. at 521 (plurality). With today's knowledge, confinement under the Kansas Act is effectively permanent. As applied to a person like Hendricks, who is not mentally incompetent and who may well live free of relapse, such confinement cannot rest on an assertion that it is in *his* best interest—that it serves *his* "treatment needs" (Kan. Stat. Ann. § 59-29a01). The Kansas Act should be candidly defended as a simple public-safety measure and assessed accordingly under the demanding constitutional standards applicable to preventive detention.

CONCLUSION

The judgment of the Supreme Court of Kansas should be affirmed.

Respectfully submitted,

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combination with another treatment approach."); *id.* at 7 ("there was no consensus even among [the reviewers discussing pharmacological treatments] about a particular drug being most effective, nor about the duration of positive effects from such interventions"); *id.* (1990 report by the Canadian Solicitor General on overall treatment programs: "'A reasonable conclusion . . . is that treatment can be effective in reducing recidivism from about 25% to 10-15%.'"); W. Marshall, D. Laws, & H. Barbaree eds., *Handbook of Sexual Assault* (1992).

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INTERESTS OF AMICI CURIAE

NACDL is a nationwide, non-profit voluntary association of criminal defense lawyers founded in 1958 to improve the quality of the representation of the accused and to advocate the preservation of constitutional rights in criminal cases. The NACDL has a membership of more than 9000 attorneys and is affiliated with 68 state and local criminal defense organizations, thus it speaks for more than 28,000 criminal defense lawyers across the country. NACDL has filed briefs in many cases before the Court involving the relationship between mental health and criminal liability, including briefs last Term in *Cooper v. Oklahoma*, 116 S.Ct. 1373 (1996), and *Montana v. Egelhoff*, 116 S.Ct. 2013 (1996).

NACDL has a keen interest in the preservation of constitutional rights applicable to criminal prosecutions, and is concerned about the erosion of these safeguards by means of statutes authorizing nominally "civil" incapacitation in place of criminal punishment.

The Kansas Association of Criminal Defense Lawyers is the local affiliate of NACDL.

Although *amici* agree with the decision of the Kansas Supreme Court that the Kansas Sexually Violent Predator Act violates the due process clause as well, this brief is limited to the ex post facto and double jeopardy issues presented in the cross-petition.[1]

SUMMARY OF ARGUMENT

In *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992), the Court foresaw that to deem confinement for the purpose of community protection a permissible civil remedy, would " be only a step away from substituting confinement for dangerousness for our present system which, with only narrow

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[1] The parties have consented to the submission of this brief by a joint letter filed with the Clerk. Rule 37.3.

exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law." In *Foucha*, the Court was concerned with the use of "civil" incapacitation **instead of** a criminal sentence; in this case, the Court is faced with confinement **in addition to** conviction and punishment. This issue arises here because while Kansas could and did authorize long prison sentences to keep repeat sex offenders off the streets, it could not apply these penalties retroactively or to persons who had already been sentenced. Kansas undoubtedly has a legitimate and important interest in protecting its citizens, and it may use means including long prison sentences to shield the community from dangerous offenders. It may not, however, accomplish this purpose by imprisoning persons who do not suffer from treatable mental illness because they have a proclivity to commit crimes. The Court should reject the State's attempt to lay a "civil" veneer over criminal punishment.

This Court's cases establish the primacy of substance over surface, as we show in Part I.A. When a statute imposes criminal penalties, this Court has not hesitated to disregard labels and apply constitutional standards. Part I.B of this Brief proposes a test for distinguishing civil from criminal sanctions we think fits the Court's precedents and is somewhat easier to apply than -- although compatible with -- the "purpose and effect" and multi-factor *Kennedy v. Mendoza-Martinez* standards the Court has invoked in the past. Because the Kansas SVP Act imposes incarceration, historically a form of punishment, on the basis of a finding that the person committed one or more criminal offenses, and because the statute is primarily for the purpose of incapacitation rather than treatment, we show in Part I.C that it is a criminal sentencing provision in substance. It follows in Sections II and III that the commitment of Leroy Hendricks under the SVP Act violates the ex post facto clause as a retroactive punishment and the

double jeopardy clause as a second "action[] intended to authorize criminal punishment to vindicate public justice." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-49 (1943).

ARGUMENT

I.
COMMITMENT OF SEXUALLY VIOLENT PREDATORS IS PUNISHMENT.

The Kansas Sexually Violent Predator Act, Kan. Stat. Ann. 59-29a01-16 (the SVP Act), was enacted in order to prolong the imprisonment of sex offenders nearing the completion of their terms of confinement, who could not be subjected to newly increased criminal sentences because of the ex post facto and double jeopardy clauses. The goal of protecting the community against sexual assaults is a legitimate and important one, which States may accomplish by a variety of means, including recidivist sentencing laws designed to incapacitate dangerous repeat offenders. The question presented in this case, most fundamentally, is whether the State of Kansas may circumvent constitutional restrictions on its powers to impose criminal punishment by labeling the punishment a "civil commitment."

A. The Label Attached to a Sanction Does Not Determine Whether it is Punishment for Purposes of Constitutional Analysis.

The Court has applied a two step analysis to determine whether a sanction is subject to constitutional restrictions applicable to criminal proceedings. *United States v. Ursery*, 116 S.Ct. 2135, 2142, 2147 (1996). The first step is to decide whether the legislature intended to create a civil or a criminal

sanction. *Id.* The Kansas legislature doubtless intended to apply a civil label to sexual predator commitments. However, a "legislature's description of a statute as civil does not foreclose the possibility it has a punitive character." *Montana Dept. of Revenue v. Kurth Ranch*, 114 S.Ct 1937, 1945 (1994) (footnote omitted). The second step is to decide "whether the statutory scheme was so punitive either in purpose or effect as to negate [the legislature's] intention to establish a civil remedial mechanism." *Ursery*, 116 S.Ct. at 2142 (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984)) (internal quotation omitted). This analysis turns on "the character of the actual sanctions imposed on the individual by the machinery of the state." *United States v. Halper*, 490 U.S. 435, 447 (1989). "In making such an assessment, 'the labels 'criminal' and 'civil' are not of paramount importance.'" *Kurth Ranch*, 114 S.Ct. at 1945 (quoting *Halper*, 490 U.S. at 447).

In *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866), this Court saw through the civil form of a Missouri constitutional provision intended to punish former Confederates by barring them from the ministry and struck it down as an ex post facto law and a bill of attainder. The Court recognized that the substance of the Missouri law was indistinguishable from one that imposed punishment, although it took the form of a qualification to practice a profession:

> The legal result must be the same, for what cannot be done directly, cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment under any form, however disguised. If the inhibition can be evaded by

> the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

Since *Cummings*, the Court has continued to recognize, as Justice O'Connor wrote in her dissenting opinion in *Montana Department of Revenue v. Kurth Ranch*, 114 S.Ct. at 1953, that "the Constitution constrains the State's ability to denominate proceedings as 'civil' and so dispense with the criminal procedure protections embodied in the Bill of Rights." In *Kurth Ranch*, the Court held that a Montana statute -- notwithstanding its form as a tax -- was in substance a second penalty for possessing marijuana, in violation of the Double Jeopardy Clause. Similarly, in *United States v. Halper*, 490 U.S. 435 (1989), the Court recognized that a nominally civil monetary penalty that was entirely disproportionate to the government's asserted civil objective was a second punishment that implicated "the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments." 490 U.S. at 447 (citing *United States ex rel. Marcus v. Hess*, 317 U.S. at 554 (Frankfurter, J., concurring)). *Kurth Ranch* and *Halper* are only the most recent in a long line of cases that have disregarded civil labels to prevent evasion of constitutional protections.[2]

The Court has been vigilant against evasion of constitutional safeguards when legislation works a deprivation of liberty. In *In re Gault*, 387 U.S. 1 (1967), and *Breed v.*

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[2] *See, e.g., Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867)(disqualification from the practice of law in federal courts is unconstitutional ex post facto punishment for supporting the Confederacy); *Lipke v. Lederer*, 259 U.S. 568 (1922)("tax" for violating liquor laws); *United States v. LaFranca*, 282 U.S. 568 (1931)(double tax on sale of liquor); *United States v. Constantine*, 296 U.S. 287 (1935)(excise tax on liquor business); *United States v. Lovett*, 328 U.S. 303 (1946) (denial of government employment).

Jones, 421 U.S. 519 (1975), the Court recognized that despite a greater concern for treatment and rehabilitation in juvenile institutions as compared to prisons for adults, "[c]ommitment is a deprivation of liberty. It is incarceration against one's will whether it is called 'criminal' or 'civil.'" 421 U.S. at 530 (quoting *Gault*, 387 U.S. at 50). In *Gault*, the Court held several provisions of the Bill of Rights applicable to juvenile delinquency proceedings, notwithstanding their "civil label of convenience." And, in *Breed*, the Court concluded that a criminal prosecution following an adjudication of delinquency for the same offense violated the double jeopardy clause. *See also In re Winship*, 397 U.S. 358 (1970) (requiring proof beyond a reasonable doubt in delinquency cases). On the other hand, in *Addington v. Texas*, 441 U.S. 418, 429 (1979), the Court ruled that the criminal procedural protections of the Bill of Rights did not reach commitments for the treatment of the mentally ill under the State's *parens patriae* authority. The Court distinguished the juvenile delinquency cases because Texas confined the mentally ill "only for the purpose of providing care designed to treat the individual." 441 U.S. at 428 n.4.

The Court has, on several occasions, examined State laws providing for the "commitment" of persons who are believed to be dangerous because of a history of sex offenses, but none of these decisions provide implicit or explicit support for the Kansas SVP Act. None of these prior cases concern a statute like the Kansas Act explicitly targeted at extending the imprisonment of persons who have already been prosecuted for, and in most cases convicted of, criminal charges and who are about to be released from custody. The first statute similar to the Kansas SVP Act was enacted by the State of Washington in

in 1990, and to date only four states, in addition to Kansas, have adopted similar, although not identical legislation.[3]

The Court's earlier cases fall into two categories, neither of which fits the Kansas statute here. The first category concern commitments used as an alternative to or diversion from criminal prosecution. *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1939), upheld a "psychopathic personality" commitment under a statute directed at persons deemed not responsible for their actions because of their psychological problems. *See Specht v. Patterson*, 386 U.S. 605, 610 n.3 (1966)(discussing and distinguishing *Pearson*). Similarly, the State was required to forego criminal prosecution to pursue commitment proceeding under the Illinois statute in *Allen v. Illinois*, 478 U.S. 364, 369 n.5 (1986). Because "the State has disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released after the briefest time in confinement," 478 U.S. at 370, the Court held that commitment proceedings under the Illinois Sexually Dangerous Persons Act should not be deemed "criminal cases" for purposes of the privilege against self-incrimination.

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[3] *See* Wash Rev. Code § 71.09; Wis. Stat. Ch. 980; Minn. Stat. Ch. 253B; Cal. Welf. & Inst. Code § 6600-6608; Ariz. Rev. Stat. § 13-4601-4609. There are some important differences between the Kansas statute before the Court and the laws enacted by other States. As we discuss below, page 24 *infra*, Washington by judicial construction and the other States by explicit enactment, provide for consideration of less restrictive alternatives to secure custody or "conditional release." California also permits commitment only if the person has a "diagnosed mental disorder." § 6600(a). California limits the initial term of commitment to two years, § 6604, rather than placing the onus on the committee to win release. Minnesota's statute makes its general civil commitment law applicable to "sexually dangerous persons" or "sexual psychopaths," rather than creating a commitment scheme limited to already prosecuted sex offenders about to be released from custody. Minn. Stat. § 253B.02, subd. 18b.

The second category consists of statutes providing a dispositional alternative for persons convicted of crimes, but in need of treatment. In these cases commitment as a sex offender is an alternative to ordinary sentencing, rather than an alternative to prosecution. In *Specht v. Patterson*, the Court considered an indeterminate commitment under a Colorado statute applicable to persons convicted of a specified sex offense who "constitute[] a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." 386 U.S. at 607. Persons committed under the Colorado Sex Offender Act could be confined longer than the maximum sentence for the offense of conviction. Finding "[t]he punishment under the Act is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm," 365 U.S. at 608-609, the Court deemed the proceedings "not unlike" sentencing under recidivist statutes providing enhanced penalties for dangerous repeat offenders, 365 U.S. at 610, and held that the due process clause required a formal hearing before commitment. Similarly, in *Humphrey v. Cady*, 405 U.S. 504, 510 (1972), Wisconsin defended indeterminate confinement under its Sex Crimes Act as "triggered by a criminal conviction . . . [and] merely an alternative to penal sentencing." The Court rejected this sentencing justification as applied to "renewals" of the commitment after the expiration of the maximum sentence for the offense of conviction, and concluded that the differences between commitments under the Sex Crimes Act and commitments for mental illness raised a substantial equal protection question.[4] None of these cases have posed ex post

[4] In *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972), and *Murel v. Baltimore City Criminal Court*, 407 U.S. 355 (1972) (per curiam), the Court declined to reach issues arising under Maryland's "Defective Delinquency Law." In *Murel*, which involved commitments "in lieu of sentence," the Court dismissed the writ as improvidently granted. *McNeil* ruled six years of confinement, after the expiration of a criminal sentence, for "observation" in conjunction with a commitment proceeding a violation of the due process clause.

facto and double jeopardy questions like those presented here, because none of them have involved efforts to augment punishment already imposed.[5]

The decision in *Allen v. Illinois* -- that the privilege against self-incrimination was inapplicable to a proceeding to commit a mentally ill sex offender for treatment as an alternative to criminal prosecution -- is not controlling here, because the State of Kansas has not "disavowed any interest in punishment, provided for the treatment of those it commits, [or] established a system under which committed persons may be released after the briefest time in confinement." 478 U.S. at 370. To the contrary, the Kansas Supreme Court found it "clear that the primary objective of the Act is to continue incarceration and not to provide treatment." Pet. App. 16a. The Kansas' Supreme Court's conclusion, as well as its finding that "treatment for sexually violent predators is all but nonexistent," Pet. App. 15a, is thoroughly supported by the record. Like juvenile delinquency prosecutions, proceedings under the Kansas act are distinguished from ordinary criminal prosecutions and sentencings only by a flimsy "civil label of convenience," *Breed*, 421 U.S. at 529, which is as important for this Court to strip away as it is easy for a legislature to apply

[5] The scarcity of decisions in recent years is probably due to the trend towards repeal or modification of specialized commitment statutes. *See* American Bar Association, *Criminal Justice Mental Health Standards* 7-8.1, Commentary at 460 nn. 19-20 (1984). The ABA has specifically called for the repeal of "[s]tatutes which provide for special sentencing and treatment of sexual psychopaths, psychopaths, or defective delinquents." Standard 7-8.1 at 455. *See also* Standard 7-9.16 (calling for use of general civil commitment statutes if offenders with mental disorders remain dangerous at the conclusion of a prison sentence).

B. A Sanction Historically Used as Criminal Punishment, Imposed After a Finding that the Person Committed a Criminal Offense, is Punishment, Except in the Rare Instance When a Civil Remedial Objective Can Be Shown to Be the Predominant Purpose for Imposing the Sanction.

In recent years, the Court has looked to the purpose or the effect of a nominally civil sanction to decide whether the sanction should be deemed punishment subject to constitutional safeguards applicable to criminal proceedings. Of the two, the inquiry into purpose is less powerful in identifying criminal punishments mislabeled as civil sanctions because there is a substantial overlap between the purposes of criminal and civil law enforcement. For example, as the Court recently said in *Bennis v. Michigan*, 116 S.Ct. 994, 1000 (1996), deterrence may be an objective of a civil enforcement scheme, just as it is undoubtedly an objective of the criminal law. *See also Ursery*, 116 S.Ct. at 2149. Similarly, rehabilitation is an important aspect of civil "treatment," but it is also compatible with criminal punishment. The rehabilitation of offenders is typically an objective of probation, as well as specialized sentencing schemes such as the old federal Narcotics Addict Rehabilitation Act and Youth Corrections Act. Even restitution and victim compensation requirements are often used to promote the rehabilitation of the offender as well as to compensate the victim. *Kelly v. Robinson*, 479 U.S. 36, 52 (1986)("criminal justice system . . . is concerned not only with punishing the offender, but also with rehabilitating him;" restitution order is not dischargeable in bankruptcy).

Incapacitation has long been recognized as a goal of criminal punishment, *see* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 10 (21st ed. 1844) and other authorities cited at pages 15-16, *infra*, but it is also a goal of civil hospitalization of the dangerous mentally ill,

Addington v. Texas, and the temporary "regulatory" confinement of persons accused of serious crimes and found to be very likely to commit new offenses while pending trial. *United States v. Salerno*, 481 U.S. 739 (1987). Even retribution is encountered in civil proceedings as the reason for awarding punitive damages. *BMW v. Gore*, 116 S.Ct. 1589, 1595 (1996)("[p]unitive damages may properly be imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition"); *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257, 275 (1989)("punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law"); *id.* at 297 (O'Connor, J., concurring in part and dissenting in part)(punitive damages are awarded not to compensate, but to punish and deter). For this reason, it is difficult to begin the examination of a statute by asking whether its purpose is exclusively civil or criminal.

Amici suggest that it is preferable to begin the analysis with an objective assessment of the sanction, not only because of the overlap between criminal and civil purposes, but also because some sanctions are inherently punitive. *See Kurth Ranch*, 114 S.Ct. at 1952 (O'Connor, J., dissenting) (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)) ("Some governmental exactions are so punitive they may be imposed only in a criminal proceeding"). For example, in *Breed v. Jones*, 421 U.S. at 529, the Court concluded it was "simply too late in the day," to treat as civil for double jeopardy purposes, "a proceeding whose object is to determine whether [the person] has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years." A sanction that meets this standard -- as commitment under the Kansas SVP Act undoubtedly does -- can be considered civil notwithstanding its objectively punitive form, only if the State can show, as Illinois did in *Allen*, that it has

"disavowed any interest in punishment." 478 U.S. at 370. Assertions that an objectively punitive sanction is really "civil" because it is for the purpose of treatment should, as the Court said of the juvenile process in *Gault*, "be candidly appraised." 387 U.S. at 21, *quoted in Breed v. Jones*, 421 U.S. at 529.

This proposal is, we think, consistent with the Court's decision in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), which collected a list of factors the Court had used to decide whether a nominally civil statute was "penal or regulatory in character." 372 U.S. at 168. In *Kennedy*, the Court relied on a legislative history establishing the punitive motivation behind a statute stripping citizenship from persons who had fled the United States or failed to return in order to avoid military service. Before recounting this history, however, the Court listed seven factors which, "are all relevant to the inquiry and may often point in differing directions." 372 U.S. at 169:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment -- retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.

372 U.S. at 168-69. The Court in *United States v. Ward*, 448 U.S. 242, 249 (1980), termed this "list of considerations . . . helpful," although "certainly neither exhaustive nor dispositive." We think the *Kennedy* standards can be distilled

and consolidated into three inquiries that provide a workable test for the purpose and effect of a nominally civil sanction: whether the sanction is historically used as punishment; whether imposition of the sanction is based on a factual determination that the person committed a crime; and whether the otherwise punitive sanction has a predominantly civil purpose.

1. Is the Sanction Historically Used as Punishment?

The first question, whether the statute imposes an affirmative disability or restraint, is a non-issue here. Confinement is clearly an "affirmative restraint." Generally, any case involving a sanction will meet this test, and it therefore plays little independent role in the analysis. The second question, whether the sanction is "historically regarded as punishment," is obviously an important one for several reasons. If the Framers of the Constitution thought of a sanction as punishment, then it is incumbent on the judicial branch to prevent legislatures from evading constitutional restrictions by reconstituting punishments as civil remedies. Moreover, the historical association of a sanction with punishment makes it more than likely that, whatever its label, the sanction is viewed by legislators, by the community, and by the person subjected to the sanction, as punishment. When all concerned regard a sanction as punishment, it is punishment. The importance of history is illustrated by this Court's recent decision in *Ursery*, which relied heavily on the history of parallel civil *in rem* forfeitures and criminal prosecutions in rejecting a double jeopardy challenge to forfeitures under 21 U.S.C. § 881. 116 S.Ct. at 2140-42, 2147. Likewise, the Court noted in *Kennedy v. Mendoza-Martinez*, that "forfeiture of citizenship and the related devices of banishment and exile

have throughout history been used as punishment." 372 U.S. at 168 n.23.

2. Is the Sanction Imposed for the Commission of a Crime?

The third question, whether *scienter* is required, is closely related to whether the behavior already is a crime. A *scienter* requirement was considered strong evidence that the factual predicate for imposing a sanction was a crime rather than a civil wrong, because *scienter* was generally the dividing line between crime and tort as the distinction between the two at English common law evolved.[6] *Scienter* was therefore evidence that a sanction was criminal, when "the behavior to which [the sanction] applies" was not "already a crime." In this case, however, there is no need for an independent inquiry into *scienter*, because the Kansas SVP Act applies only to persons proved beyond a reasonable doubt to have committed a violation of Kansas criminal law. The Court has repeatedly found "[t]hat condition is 'significant of penal and prohibitory intent,'" *Kurth Ranch*, 114 S.Ct. at 1947(citation omitted). *See also United States v. U.S. Coin & Currency*, 401 U.S. 715, 721-22 (1971); *United States v. LaFranca*, 282 U.S. 568, 575 (1931); *Lipke v. Lederer*, 259 U.S. 557, 562 (1922); *Ursery*,

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[6] At common law, a *scienter* requirement was one of the principal features distinguishing a crime from the overlapping tort. *See* 3 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 373-74 (1966 reprint)(5th ed. 1942); 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 289 (Woodbine ed. 1968). For this reason, when a statute requires proof of scienter, even though there is no such offense in the criminal code, a sanction is likely to be deemed criminal. *See e.g., Child Labor Tax Case*, 259 U.S. 20, 37 (1922)(Congress cannot evade restrictions on its regulatory power over commerce by styling a penalty with a scienter requirement a tax). *Scienter* remains an important hallmark of criminal liability. *See Morrisette v. United States*, 342 U.S. 246 (1952); *Liparota v. United States*, 471 U.S. 419, 426 (1985).

116 S.Ct. at 2144 (noting that "only a person charged with a criminal offense was subject to the tax" in *Kurth Ranch*). When an adjudication means that the person has been found to have committed a crime, it is just as stigmatizing as a conviction, and should be treated as a conviction under the Constitution.

3. Is the Sanction Imposed for a Predominantly Criminal Purpose, Such as Incapacitation, Rather than a Predominantly Civil Purpose, Such as the Treatment of a Mental Illness?

The remaining *Kennedy* inquires relate to the *purpose* of the sanction. In asking whether the sanction will "promote the traditional aims of punishment -- retribution and deterrence," the word "deterrence" is used in its broad sense of promoting crime prevention. Incapacitation is a form of specific deterrence. *See* J. ANDENEAS, PUNISHMENT AND DETERRENCE, 165-81 (1974). It has long been a recognized goal of criminal punishment. Blackstone lists "depriving the party injuring of the power to do further mischief," as one of the ends of punishment. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 10 (21st ed. 1844). *See also* 1 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW § 2 AT 2 (8th ed. 1880); 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 1 AT 2-3 (15th ed. 1993). Incapacitation is widely regarded as an objective of punishment by scientists, *e,g.*, NATIONAL RESEARCH COUNCIL, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (1978), as well as by contemporary legal scholars, *e,g.*, HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 50-51 (1968); PETER W. LOW, JOHN C. JEFFRIES & RICHARD J. BONNIE, CRIMINAL LAW: CASES AND MATERIALS at 1, 24-26 (1982); WAYNE R. LAFAVE

& AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 9 (1972).[7]

"It would be archaic to limit the definition of 'punishment' to retribution. Punishment serves several purposes: retributive, rehabilitative, deterrent -- and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." *United States v. Brown*, 381 U.S. 437, 458 (1965); *accord Nixon v. General Services Administration*, 433 U.S. 425, 476 n.40 (1977). As Justice Kennedy observed in his dissenting opinion in *Foucha v. Louisiana*, "Incapacitation for the protection of society is not an unusual ground for incarceration. '[I]solation of the dangerous has always been considered an important function of the criminal law." 504 U.S. at 99 (quoting *Powell v. Texas*, 392 U.S. 514, 539 (1968) (Black, J., concurring); alteration in original). For this reason, the Court in *Specht v. Patterson* deemed confinement under Colorado's sexual psychopath statute "criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm." 386 U.S. at 608-09.

The last *Kennedy* considerations ask whether an alternative purpose for a sanction has been offered, and whether the sanction is "excessive in relation to the alternative purpose assigned." This latter question addresses the same issue of proportionality between a civil purpose and the severity of a sanction the Court has discussed in its recent opinions in *Halper*, *Austin*, and *Kurth Ranch*. *See Ursery*, 116

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[7] Likewise, incapacitation is a goal of punishment under federal sentencing law, 18 U.S.C. § 3553(a)(2)(C); the federal sentencing guidelines, U.S.S.G. Ch. 1, Pt. A.3, p.s.; the Model Penal Code, § 1.02(1)(b), (2)(a) & Comment. at 21 (1985); the Model Sentencing and Corrections Act of the National Commission on Uniform State Laws § 3-102(4)(i); and the American Bar Association Criminal Justice Standards on Sentencing Alternatives and Procedures, Standard 18-2.5(c)(i).

S.Ct. at 2145-46 (discussing cases). Unlike a monetary sanction, incarceration cannot be apportioned between punitive and remedial goals to determine whether it is excessive. Moreover, as Justice Kennedy observed in *Foucha*, "incarceration of persons . . . is one of the most feared instruments of state oppression," 504 U.S. at 93, and should therefore be subject to the most stringent constitutional regulation. Incarceration, especially when it is imposed after a finding that a crime has been committed, can be deemed civil only when the alternative civil purpose is the *predominant* reason for imposing the sanction.

C. Because The Kansas Sexually Violent Predator Act Imposes Incarceration, Historically a Form of Punishment, On the Basis of the Commission of Criminal Conduct, and for the Purpose of Incapacitation, Not Treatment, It is Punishment.

Once the "civil commitment" label is put aside, the confinement of dangerous sex offenders under the new Kansas statute is unmistakably criminal punishment. The consequences of commitment under the Kansas SVP Act, the factual predicate for commitment, and the procedures leading to commitment, mirror a criminal prosecution. "Commitment is a deprivation of liberty. It is incarceration against one's will whether it is called 'criminal' or 'civil.'" *Breed v. Jones*, 421 U.S. at 530(quoting *Gault*, 387 U.S. at 50). In *Specht* this Court recognized that imprisonment of a sexual psychopath after conviction was criminal punishment, and there is no reason to reach any different conclusion here.

It makes no difference that Leroy Hendricks' legal custodian is the Department of Social and Rehabilitation Services, rather than the Department of Corrections, any more than it made a difference in *Breed* that it was the California Youth Authority that had responsibility for confining juveniles.

A benign label for a custodian is no more determinative of the constitutional reality than a civil label on a statute. Similarly, it makes absolutely no difference that the facility in which Mr. Hendricks is confined is called a hospital rather than a penitentiary. In most jurisdictions, including Kansas, convicted prisoners who need mental health treatment are transferred to "hospital" facilities, but this does not mean they are no longer being punished by confinement. *See Vitek v. Jones*, 445 U.S. 480, 493-94 (1980)(describing additional curtailment of liberty effected by transfer to prison mental hospital).

The Larned Correctional Mental Health Facility houses convicted and sentenced prisoners as well as "committees" under the Kansas SVP Act. It does not house committees under Kansas's general civil commitment law, who must be segregated from "predators" by law. Kan. Stat. Ann. 59-29a07. The actual conditions of confinement also reveal that SVP commitments are punitive. The Department of Corrections is responsible for running the facility, and "committees" share essentially the same living conditions as sentenced prisoners.[8] "Thus, in terms of potential consequences, there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution." *Breed v. Jones*, 421 U.S. at 530.

There is also no meaningful difference between the substance of a commitment proceeding under the SVP Act and a criminal trial and sentencing. In *Allen v. Illinois*, 478 U.S. at 371, the Court relied on the difference between the type of factual determinations made in a commitment hearing under

[8] Another indication that "commitment" under the SVP Act is equivalent to a criminal sentence is that the same "aggravated escape" statute applies to escapes from custody for SVP evaluation or commitment as applies to prison escapes, but not to escapes from civil hospitalization for mental illness. Kan. Stat. Ann. 21-3810.

the Illinois statute and those made in a criminal trial, referring to its prior decision in *Addington v. Texas*. In this case -- unlike *Allen* and *Addington* – the factual determination the jury is asked to make is essentially a finding of repeated criminal liability. The predicate for commitment is that the person was charged with a specified sex crime Kan. Stat. Ann. 59-29a02(a), and either convicted and sentenced, Kan. Stat. Ann. 59-29a03(a)(1), found not guilty by reason of insanity and confined, Kan. Stat. Ann. 59-29a03(a)(3),(4), or found incompetent to stand trial and confined, Kan. Stat. Ann. 59-29a03(a)(2). Proof of a criminal offense beyond a reasonable doubt is required for conviction, and for involuntary commitment of a person found not guilty by reason of insanity.[9] The SVP Act also explicitly requires such a finding to be made in the case of an untried incompetent defendant as well before proceeding with a commitment. Kan. Stat. Ann. 59-29a07(b). Even more than the tax for possessing marijuana in *Kurth Ranch*, commitment under the Kansas SVP Act "is conditioned on the commission of a crime. That condition is 'significant of penal and prohibitory intent.'" 114 S.Ct. at 1947 (quoting *United States v. Constantine*, 296 U.S. 287, 295 (1935)).

By contrast, in *Ursery*, the predicate for *in rem* civil forfeiture was related to the commission of a crime, but historically distinguished from criminal punishments by the fiction that the guilty article, rather than the criminal, is "held guilty and condemned." 116 S.Ct. at 2145 (citation omitted). Moreover, "instrumentality forfeiture statutes are not directed at those who carry out the crimes, but at owners who are culpable for the criminal misuse of their property." *Id.* at 2150

[9] Under current Kansas law, commitment is based upon the jury's answer to a "special question" asking whether its "not guilty" verdict is based on the lack of *mens rea* due to insanity. Kan. Stat. Ann. 22-3221; 22-3428.

(Kennedy. J., concurring). *See also United States v. One Assortment of 89 Firearms*, 465 U.S. at 363 (forfeiture statute "somewhat broader in scope" than criminal provision).

The elements of proof required for commitment in addition to the commission of a specified offense do not shift the focus of fact-finding from criminal conduct to questions of diagnosis. *See Addington*, 441 U.S. at 427-29. As the State's own expert conceded at Mr. Hendricks' hearing, the "mental abnormality" required for commitment consists of nothing more than repeated deviant sexual conduct. (J.A. 263-64). If a pattern of sex offenses exists, the "mental abnormality" is proved whether mental health professionals can identify any treatable mental condition or not. Nor does commitment really turn in any important way on the ability of an expert in a particular case to predict future behavior. Mr. Hendricks' expert witness, Dr. Logan testified to the unreliability of such predictions. (J.A. 315).[10] The jury was instructed that the statutory standard is "likely" to reoffend; the court declined to elaborate on how great the risk must be. (J.A. 359). Dr. Logan himself acknowledged that "you are not going to expose your kids to a 30% risk." (J.A. 356). Testimony before the Kansas legislature made it clear that the community would expect near certainty before allowing the release of a person who had repeatedly committed sex offenses. Although the statute imposes a rigorous standard of proof beyond a reasonable doubt, this standard applies to the proof of an undetermined, and presumably very low, level of risk. For this reason, it is the pattern of past criminal conduct, not a diagnostic assessment of future conduct by an expert, that dominates the commitment proceeding.

Commitment proceedings under the SVP Act mirror the stages of a criminal case. The petition seeking Mr.

[10] *Cf. Heller v. Doe by Doe*, 509 U.S. 312, 323 (1993) (predictions of dangerousness are inaccurate).

Hendricks' commitment was filed by the same office that prosecuted him in 1984. (J.A. 4-7). Now, responsibility for filing petitions has shifted to the Attorney General, Kan. Stat. Ann. 59-29a04, following review by a committee of prosecutors. Kan. Stat. Ann. 59-29a03(e). This reassignment does not change the accusatorial character of the pleading.[11] A probable cause hearing, not unlike a criminal preliminary hearing follows. If probable cause is found, a trial is held, and either side may demand a jury. The State must prove its case beyond a reasonable doubt. "Compliance with the standard of proof beyond a reasonable doubt is the defining, central feature in criminal adjudication, unique to the criminal law." *Foucha v. Louisiana*, 504 U.S. at 93 (Kennedy, J., dissenting). By contrast, in *Ursery*, the Court observed that by creating "distinctly civil procedures" for forfeitures Congress has indicated clearly that intended a civil, not a criminal, sanction.'" 116 S.Ct. at 2148 (quoting *89 Firearms*, 465 U.S. at 363). In form, the commitment proceeding is therefore "not unlike" a recidivist sentencing proceeding, *see Specht*, 386 U.S. at 610. Proof of one crime, followed by proof of a pattern of similar offenses, leads to a determination that the person should be imprisoned for the safety of the community.

An adjudication under the Kansas statute conveys at least as much "community condemnation" as any criminal conviction. *See* Henry Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 404 (1958) (condemnation is the distinguishing feature of the criminal law). In *Gault*, and again in *Breed*, the Court observed that a juvenile adjudication is almost as stigmatizing as a criminal conviction. But at least juvenile adjudications (at the time) were imposed in closed proceedings and could often be expunged or sealed to protect the juvenile offender from later stigma. Here, the label

[11] The State concedes the recent changes in the statute do not affect its constitutionality. Pet. Br. 1,6.

"sexually violent predator" is affixed in full public view. It is hard to imagine a more stigmatizing label.[12] Indeed, the Kansas legislature used similar words in a parallel criminal statute to describe repeat offenders subject to much longer sentences. Kan. Stat. Ann. 21-4716. By contrast, the commitment statutes in *Minnesota ex rel. Pearson*, and *Allen*, implied a determination that the sex offender bore diminished or no criminal responsibility for his crime as a result of a mental illness.

The remaining question, then, is whether the commitment statute may be justified by the alternative purpose of affording treatment to persons with mental abnormalities. The Kansas Supreme Court found it "clear that the primary objective of the Act is to continue incarceration and not to provide treatment." Pet. App. 16a. We think that determination is entitled to deference, *cf. Romer v. Evans*, 116 S.Ct. 1620, 1627 (1996)(deferring to "authoritative" construction of Colorado's constitutional amendment by its State Supreme Court). But even if the Court were to examine

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[12] The depth of feeling evoked by the label "sexual predator" is evident in the bipartisan and nearly universal support of recent federal legislation requiring convicted sex offenders to register with local law enforcement authorities. *See* President's Remarks at Signing of Megan's Law, 1996 WL 263016 (May 17, 1996); 142 Cong. Rec. S4921-01, 1996 WL 238971 (May 9, 1996)(Sen Dole); 142 Cong. Rec. S4845-01, 1996 WL 233571 (May 8, 1996)(Sen. Dole); 142 Cong. Rec. E732-02, 1996 WL 23360 (May 7, 1996)(Rep. Martini). *See also* Peter Davis, "Rage in Englewood," *The New York Times Magazine* 20-27, 36, 40, 43 (July 28, 1996)(recounting, *inter alia*, the mistaken beating of a person believed to be a sex offender); Abril Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 907-08 (1995)(examples of vigilantism against released sex offenders); Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 N.W.U. L. REV. 788, 824 (1996)(same).

the Kansas statute *de novo*, it would come to the same conclusion.

The court below thought the treatment justification offered for the Act was "disingenuous," Pet. App. 20a, finding that "Hendricks is not mentally ill and the crimes for which he was imprisoned were not the result of mental illness." *Id.* The text of the statute states that ordinary forms of mental health treatment are ineffective for violent sexual predators.[13] Kan. Stat. Ann. 59-29a01. *Cf. Foucha*. 504 U.S. at 82 (no effective treatment for antisocial personality disorder). It adds that "the prognosis for [treatment] in a prison setting is poor." *Id.* Yet treatment in a prison setting is exactly what Kansas has provided.

By definition, commitment under the Kansas SVP Act means confinement in a "secure facility," Kan. Stat. Ann. 59-29a07(a), while ordinarily the level of custody for purposes of treatment under a commitment for mental illness is in the least restrictive setting compatible with the safety of the community.[14] "Conditional release" on terms that are appropriate for a particular individual short of secure confinement is not an option under the Kansas statute, but it was available to committees under the statute before the Court in *Allen*, 478 U.S. 369 n.4, as well as under other recent sex offender commitment laws.[15] Under the Kansas statute, a

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[13] Current data on the efficacy of sex offender treatment are somewhat more encouraging, but inconclusive. General Accounting Office, *Sex Offender Treatment: Research Results Inconclusive About What Works to Reduce Recidivism* 3, 11 (June 1996)(Report to Chair of Subcommittee on Crime, House Judiciary Committee).

[14] *See e.g., Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966)(en banc).

[15] *Compare In re Young*, 857 P.2d 989, 1012 (Was. 1993)(construing Washington SVP statute to require consideration of alternatives to total confinement); *State v. Carpenter*, 541 N.W.2d 105, 110-111 (Wis. 1995)(violent sexual offender statute requires consideration of less

committee can be released from a prison hospital only by showing that he is ready to live in the community ("safe to be at large") without any formal supervision.

The legislative history confirms that treatment was, at best, "incidental" to the purpose of incapacitation. Pet. App. 15a.[16] Proponents of the legislation spoke openly of the hope that "none of them should ever be released," (J.A. 468), and that the statute "would allow us to keep sexually violent offenders locked up indefinitely." (J.A. 478). Even the principal sponsor, who was careful to say the bill was civil rather than punitive in purpose, mentioned treatment only in passing. (J.A. 460). Moreover, the legislature was well aware that mental health professionals doubted the availability of treatment for most sex offenders in general, and the adequacy of treatment resources in Kansas in particular. (*See* J.A. 483-84, 503, 569). The legislature also heard that release under the statute would be a near-impossibility, because although the State bore the burden of proof at a hearing, mental health professionals would not certify the "probable cause" to believe the committee was no longer dangerous and was "safe to be at large" required get a hearing, because of the risk of liability or censure if a committed "predator" committed a new offense after release. (J.A. 483, 509, 567). The Kansas legislature certainly did not expect "committed persons [to] be released after the briefest time in confinement." *Allen*, 478 U.S. at 370.

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restrictive alternatives and permits supervised release); Cal. Welf. & Inst. Code §§ 6607, 6608 (requiring consideration of conditional release in less restrictive setting); Ariz. Rev. Stat. §§ 13-4606(B), 4607(A)(requiring consideration of less restrictive placement during initial commitment and subsequent release hearings); Minn. Stat. § 253B.09 (least restrictive alternative placement).

[16] The same is true of the Washington precursor to the Kansas statute. The background to the adoption of the Washington statute is set forth in the brief of the Seattle-King County Defender Association, et al.

See Kan. Stat. Ann. 59-29a01 (treatment needs "very long term").

Implementation of the statute conformed to the legislature's purpose. The acting clinical director of the program admitted, and the Kansas Supreme Court found, several months after Mr. Hendricks was committed that committees were receiving "essentially no treatment." (J.A. 393); Pet. App. 15a. Even if the State were now to remedy the deficiencies in its treatment program, it would not change the evidence that treatment was at best an afterthought, and that incapacitation was the real purpose of commitment.

The Kansas SVP Act is punitive in design. Criminal sentencing standards are applicable here, just as they were in *Specht v. Patterson*.

II.
COMMITMENT FOR ACTS COMMITTED BEFORE THE ENACTMENT OF THE STATUTE VIOLATES THE EX POST FACTO CLAUSE

The ex post facto clauses of the Constitution forbid both state and federal legislatures from retroactively increasing the punishment attached to a crime. *California Dept. Of Corrections v. Morales*, 115 S.Ct. 1597, 1601 (1995); *Collins v. Youngblood*, 497 U.S. 37, 41-42 (1990); *Beazell v. Ohio*, 269 U.S. 167, 169 (1925); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-92 (1798). Because the Kansas SVP Act provides a new punishment, retroactive application of that statute violates the ex post facto prohibition of Article I, § 10, cl.1.

III.
THE COMMITMENT HEARING PLACED LEROY HENDRICKS AT RISK OF A SECOND PUNISHMENT FOR THE SAME OFFENSE.

The Court is accustomed to categorizing claims under the Double Jeopardy Clause as "successive punishment" or "successive prosecution" claims. *Ursery*, 116 S.Ct. at 2139. The harm here could be characterized either way, because it is a paradigmatic violation of the Double Jeopardy Clause. As the Court said in *Breed v. Jones*, "Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with criminal prosecution." 421 U.S. at 528. Put another way, jeopardy is the risk of criminal punishment. *See Breed*, 421 U.S. 529 ("the risk to which the term jeopardy refers is that traditionally associated with 'actions intended to authorize criminal punishment to vindicate public justice.'") (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. at 548-49). A necessary element of the State's case against Mr. Hendricks was his conviction for sexual offenses in 1984, offenses for which he had already been placed in jeopardy, convicted and sentenced.[17] The commitment is therefore an impermissible second punishment for those offenses. The fact that the second punishment is imposed in a "trial-like" proceeding, *see Bullington v. Missouri*, 451 U.S. 430 (1981); *Poland v. Arizona*, 476 U.S. 147, 154 (1986), implicates the additional "humane interests" injured by a second prosecution.

The central purpose of the Double Jeopardy clause is to "protect[] against the possibility that the Government is

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[17] The imposition of sentence gave Mr. Hendricks an expectation of finality. *See Jones v. Thomas*, 491 U.S. 376, 392 (Scalia, J., dissenting)("the Double Jeopardy Clause is a statute of repose for sentences as well as for proceedings. Done is done").

seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." *United States v. Halper*, 490 U.S. at 451 n.10. That is precisely what the State of Kansas has done here. Having enjoyed the benefit of its plea agreement to a 5-20 year sentence, the State has resolved to get much tougher on repeat sex offenders. While the State of Kansas is undoubtedly entitled to crack down on those it has not yet punished, it cannot add to the penalty it previously imposed on Mr. Hendricks, because that would violate the Double Jeopardy Clause.

CONCLUSION

The judgment of the Supreme Court of Kansas should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1995

STATE OF KANSAS,

Petitioner,

v.

LEROY HENDRICKS,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Kansas

BRIEF OF AMICUS CURIAE WASHINGTON STATE PSYCHIATRIC ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The Washington State Psychiatric Association (hereafter the Association) is comprised of more than 500 qualified doctors of medicine specializing in psychiatry. Due to their training and experience diagnosing and treating mental disorders and mental illness, members of the Association frequently diagnose and/or treat persons who are the subject of involuntary commitment proceedings, including persons who have committed sexual offenses. The Association is familiar with criteria employed in the commitment of people suffering from mental illness, and with the scientific findings regarding sexual offenders.

Psychiatry is at the forefront of mental health knowledge. The psychiatric profession has produced the leading authoritative text on the diagnosis of mental disorders, namely, the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (1994). The psychiatric profession has also produced the leading authoritative text on the treatment of mental disorders, namely, *Treatments of Psychiatric Disorders* (1989). Organic methods to treat sex

offenders, such as the administration of Depo Provera, are studied and exclusively implemented by psychiatrists or other qualified physicians.

The Association is familiar with the Kansas statute at issue here, which is patterned upon a very similar statutory scheme enacted in the State of Washington. When the Washington statute was recently ruled unconstitutional by the United States District Court for the Western District of Washington, the court cited the amicus brief submitted by the Association as providing pertinent information. *Young v. Weston*, 898 F. Supp. 744, 750 (W.D. Wash. 1995).

The Association is deeply concerned about the harm caused by sexual offenders, and strongly supports proper efforts to protect the public from violent offenders of all kinds. Nevertheless, the Association has grave misgivings about the premises on which the above-mentioned statute is based, and about the consequences of implementing it.

The Association submits this brief so that the Court may have the benefit of current psychiatric knowledge and the

scientific evidence having a bearing on the issues before this Court.[1]

SUMMARY OF ARGUMENT

The Kansas Sexually Violent Predator Act, K.S.A. 59.29a01 (hereafter the Act) is fundamentally flawed because it allows the involuntary commitment of persons who are not mentally ill, and who therefore would not qualify for involuntary commitment under the Kansas involuntary treatment act, K.S.A. 59-2901, *et. seq.*

ARGUMENT

1. "Mental illness" is not synonymous with "mental disorder."

It is well accepted in modern psychiatry that "mental illness" requires, as a threshold determination, the existence of a mental disorder. A mental disorder is a "clinically significant behavioral or psychological syndrome or pattern that is associated with present distress, disability, suffering, or loss of freedom." *Diagnostic and Statistical Manual* (Fourth Edition), published by the American Psychiatric Association, 1994, at p. xxiv (hereafter, the DSM-IV).

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1 The parties have consented to the filing of this amicus brief. A letter granting consent has been submitted to the Clerk.

Accurately labeling any individual as "mentally ill" involves a two step process. First, a mental health professional must diagnose that individual as suffering from a mental disorder based on diagnostic criteria as set forth in an authoritative text such as the DSM-IV.

If the individual is found to suffer from a mental disorder, it would next be determined whether the disorder is of a type and severity which would merit the label "mental illness" for the purpose of either voluntary or involuntary commitment to a psychiatric hospital for treatment.

It must be emphasized that not all "mental disorders" found in the DSM-IV would be deemed by any competent mental health provider as constituting a "mental illness" as that term is ordinarily used in the context of civil commitment proceedings. Many and perhaps most of the mental disorders described in the DSM-IV would almost certainly **not** be regarded as a "mental illness" for purposes of involuntary commitment. Even a cursory review of the DSM-IV provides numerous examples of disorders which would rarely, if ever, be labeled as a mental illness; e.g., Male Erectile Disorder (p. 502);

Female Orgasmic Disorder (p. 505); Caffeine Induced Sleep Disorder (p. 604); Nightmare Disorder (p. 580); Nicotine Use Disorder (p. 243), to name but a few.

Simply put, it is extremely unlikely that anyone will ever be involuntarily committed because of nicotine addiction, for example. Any argument that "mental illness" and "mental disorder" are synonymous flies in the face of common sense and sound psychiatric practice.

What, then, is necessary for a diagnosis of "mental illness?" In the context of involuntary commitment, it is widely understood in the psychiatric profession that to be identified as "mentally ill," a person must be suffering from a serious cognitive, perceptual or affective dysfunction which significantly impairs that person's ability to function in ordinary life. This understanding of mental illness derives from a comprehensive view of health and illness, as aptly explained by Robert F. Schopp & Barbara J. Sturgis in *Sexual Predators and Legal Mental Illness for Civil Commitment* (1995) at 444:

> A person is ill when his or her ability to function as a system is impaired by some

> pathological process of a biological or psychological subsystem. A person is mentally or psychologically ill when some pathology of psychological process impairs his or her ability to function at some previously defined level of psychological health in some intrapersonal or interpersonal aspect of ordinary life. Psychological processes such as perceptions, memory, comprehension, mood or reasoning are pathological if they fall significantly below the range of ordinary functioning.

Schopp & Sturgis further state (at 445):

> For the sake of clarity, we use "psychological impairment" or "psychological dysfunction" to refer to impairment of psychological processes including, for example, distorted thought process such as delusional thought, perceptual distortions such as hallucinations, or disturbed affect such as depressed mood.

See also Christopher Boorse, "Concepts of Health" in *Health Care Ethics*, 364-71 (Donald Van De Veer & Tom Regan, eds., 1987), and Michael Moore, *Law and Psychiatry*, 189-95 (1984), cited by Schopp & Sturgis.

Based on the foregoing, a person diagnosed as schizophrenic, for example, would be deemed to be mentally ill because schizophrenia is characterized by severely impaired cognitive or perceptual functioning, thus creating a substantial and enduring loss of contact with reality. A person with severely disturbed affect may also be deemed to be mentally ill. A major depression, for example, may be so severe as to impair a person's ability to survive.

In all instances of mental illness, the essential feature is a dysfunction or impairment of a psychological process which in turn substantially impairs a person's ability to function in everyday life. While all mental disorders will involve some degree of suffering or distress, most disorders do not involve an impairment of the type or magnitude necessary for a diagnosis of mental illness.

2. Not all sex offenders suffer from a mental disorder or mental illness.

Some sex offenders suffer from a mental disorder, and some are undoubtedly "mentally ill." However, the fact of being a sex offender does not, in itself,

imply a mental disorder or mental illness. Deviant behavior which is criminal does not in itself constitute a mental disorder:

> Neither deviant behavior (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of dysfunction in the person, as described above.

DSM-IV, at p. xxii.

Numerous factors contribute to the conduct of sex offenders; e.g. poor socialization with respect to sexual mores, lack of impulse control due to alcohol, pressures to conform to expectations of peers. Their motivation for deviant behavior may include (for example) an expression of anger, a desire to control, or a desire to inflict suffering. Offenders can and do engage in wrongful conduct for reasons other than mental illness. *Encyclopedia of Crime & Justice*, Vol. 4 (1983) at 1486-1487. Many sex offenders offend only if they are in a situation conducive to a criminal act; i.e., an opportunistic setting.

Encyclopedia of Crime & Justice, supra, at 1489-1490.

The scientific findings concerning the underlying causes of sexual offending were recently summarized as follows:

> A great variety of psychiatric symptoms, cognitive deficits, social deficits, and histories have been reported to be characteristics of sex offenders. These characteristics include denial or minimization of offending, cognitive distortions about their victims, impaired control of anger or sexual impulses, substance abuse, poor assertiveness and social skills, absence of appropriate enjoyable activities, lack of sexual education, problems of intimacy, previous sexual traumatization, as well as deviant sexual arousal and preferences.
>
> ****
>
> Identifying characteristics of sex offenders does not establish the etiology of the behavior. It is typically not possible to determine the "cause" of sexual offending; most behavior, sexual or otherwise, is considered multiply determined.

Robert M. Wettstein, *A Psychiatric Perspective on Washington's Sexually*

Violent Predators Statute, 15 U. Puget Sound L. Rev. 597, 601 (1992).

The foregoing facts are becoming increasingly well-recognized. The view that being a sex offender implies an identifiable mental illness or disorder has been widely rejected, as shown by recommendations to repeal laws premised on such a view:

> Growing awareness that there is no specific group of individuals who can be labeled sexual psychopaths by acceptable medical standards and that there are no proven treatments for such offenders has led such professional groups as the Group for the Advancement of Psychiatry, the President's Commission on Mental Health, and most recently, The American Bar Association Committee on Criminal Justice Mental Health Standards to urge that these [sexual psychopath] laws be repealed.

See Samuel J. Brakel, John Parry and Barbara A. Weiner, *The Medically Disabled and the Law,* 3rd ed. (1985) at 743.

At least one national mental health organization whose members specialize in treating sex offenders also rejects the notion that deviant sexual behavior

constitutes a mental disease or illness. The Association for the Treatment of Sexual Abusers has published a "Practitioner's Handbook" which asserts (at p. 1) that sex offenders have a learned behavioral disorder, not a mental "disease."

> Sexual deviance is a learned or acquired behavioral disorder. Treatment is focused on recognizing, changing and managing deviant behavior and the attitudes that promote it. Sexual deviance is not considered to be a disease that can be cured.

3. The Act in question is not intended to require a finding of mental illness.

In its legislative finding stated in K.S.A. 59-29a01, the Kansas legislature announced its recognition that sexual offenders are not necessarily mentally ill:

> The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et. seq. and amendments thereto....

The involuntary treatment act referred to by the Kansas legislature allows commitment of persons who are "mentally ill." Under K.S.A. 59-2902(h), a "mentally ill person" is any person who:

> 1. Is suffering from a severe mental disorder to the extent such person is in need of treatment;
>
> (2) lacks capacity to make an informed decision concerning treatment; and
>
> (3) is likely to cause harm to self or others.

The involuntary treatment act further defines "severe mental disorder" as:

> ...a clinically significant behavioral or psychological syndrome or pattern associated with either a painful symptom or serious impairment in one or more important areas of functioning and involving substantial behavioral, psychologic or biologic dysfunction. "Severe mental disorder" does not include a condition which is caused by the use of chemical substances or for which the primary diagnosis is antisocial personality.

K.S.A. 59-2902(o).

The definition of "severe mental disorder" found in the Kansas involuntary treatment act is consistent with the

psychiatric understanding of mental illness, summarized earlier.

The Kansas involuntary treatment act provides an effective means to protect the public from dangerous sex offenders who are also mentally ill. The aim of the Act at issue in this case, namely, the Kansas Sexually Violent Predator Act, is to allow involuntary commitment of sex offenders who are **not** mentally ill.

4. The Act in question employs unsound criteria.

As pointed out above, the Kansas legislature recognized the offenders it wishes to commit may not be mentally ill. Accordingly, the Act does not require a finding of mental illness. It is sufficient under the Act if the offender has a "mental abnormality" or "personality disorder." K.S.A. 59.29a02.

The term "mental abnormality" has no clinically significant meaning and has long been in disuse because the word "abnormal" has several meanings which differ in important ways. Webster's Third New International Dictionary (1986) defines "abnormal" as:

> 1. deviating from the normal...differing from the typical...2. greater than

> or superior to the normal...3. less than or inferior to the normal: deficient in intellectual powers: characterized by mental defect or disorder...4. departing from the accepted standards of social behavior....

In short, something that is "abnormal" could be desirable or undesirable, or could involve underlying mental processes or merely observable behavior, depending on the intended meaning of the user. Undoubtedly due to these ambiguities, "abnormality" is not a diagnostic or explanatory concept in authoritative texts such as the DSM-IV.

Because "mental abnormality" has no recognized clinical meaning, there is no way to assure it will be applied so that only persons who are mentally ill are subject to civil commitment. As stated by Wettstein, *supra*, at 602:

> "Mental abnormality" connotes sufficient vagueness that nearly any symptom, deficit, or historical detail might be included. "Mental abnormality" is much broader than any conceivable contemporary psychiatric diagnosis of mental disorder or mental illness. The definition is too broad and

> elastic to avoid improperly encompassing a wide variety of individuals....

In an effort to avoid the ambiguity inherent in the term "abnormality," the Kansas Legislature defined it in K.S.A. 59-29a02 as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses...."

The foregoing definition cannot provide meaningful guidance to mental health professionals, judges, or lay persons. Stripped to its barest essentials, "abnormality" was defined as something -- a "condition" -- which predisposes a person to commit sex crimes. Because all who are subject to the Act will have been charged with or convicted of a sex offense, the required predisposing condition will be defined by the acts which were committed. The result is a criterion which can be stretched to fit all sex offenders, whether mentally ill or not.

A virtually identical definition of "mental abnormality" was provided by the Washington legislature in the statutory scheme on which the Kansas act is

patterned. When the Washington statute was ruled unconstitutional, the District Court correctly observed that the "mental abnormality" criterion "has neither a clinically significant meaning nor a recognized diagnostic use among treatment professionals." The court further observed that the definition of "mental abnormality" provided by the legislature is tautological. *Young v. Weston*, 898 F. Supp. 744, 750 (W.D. Wash. 1995).

The Act also allows commitment on a finding of a "personality disorder." The concept of "personality disorder" has a clinically recognized meaning, and is explained in the DSM-IV at 630:

> Personality traits are enduring patterns of perceiving, relating to, and thinking about the environment and oneself, and are exhibited in a wide range of social and personal contexts. It is only when personality traits are inflexible and maladaptive and cause significant functional impairment or subjective distress that they constitute Personality Disorders.

It is apparent that a "personality disorder" is a shorthand way to describe or label a pattern of maladaptive

behaviors. Rarely if ever will an individual be deemed "mentally ill" for the purposes of civil commitment because of a personality disorder alone.

The DSM-IV describes no personality disorder which is peculiar to sex offenders. As a result, courts can expect efforts to invent such a personality disorder merely by labeling a pattern of sex offenses as a personality disorder, which is then diagnosed from this pattern of offenses. From this it is an easy step to assert that the sexual offenses are caused by the personality disorder. Although exercises of this type would satisfy the requirements of the Act, they are entirely circular. That is, a summary description of the offender's behavior is transformed into its cause.

The circularity of the "personality disorder" criterion was noted by the court in *Young v. Weston*, *supra* at 750, when finding the similar Washington statute to be unconstitutional:

> As with the concept of mental abnormality, the statute's use of "personality disorder" evokes a circular definitional structure in which the only observed

characteristic of the disorder is the predisposition to commit sex crimes.

To avoid inventing a personality disorder to fit the offense when implementing the Act, efforts may be made to rely on a DSM-IV diagnostic category labeled "Antisocial Personality Disorder." It may be argued that the presence of this category allows sex offenders to be labeled with a recognized "disorder."

There is little doubt that some sex offenders display features of an "antisocial personality" in that they have shown a "pervasive pattern of disregard for, and a violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood." DSM-IV, at 645.

Courts should not allow commitment of persons who are characterized solely by an "antisocial personality," for two reasons. First, this criterion would allow use of our mental institutions for warehousing all "undesirables;" i.e., people who repeatedly show disregard for the rights of others.

Second, people characterized by an antisocial personality disorder are not

for that reason mentally ill. These are people for whom "deceit and manipulation" are central features, who "disregard the wishes, rights or feelings of others," and who "tend to be consistently and extremely irresponsible." DSM-IV at 645-646.

There is no evidence that persons with these traits suffer from a mental defect or impairment rendering them incapable of comprehending or conforming to societal norms. Instead, persons with these traits make choices reflecting a failure of moral development, probably stemming from early or middle childhood. See Leon Rappoport, *Personality Development: The Chronology of Experience* (1972), at 174-175, 244.

The larger community obviously deserves protection from people with the foregoing traits. It does not follow that protection should involve civil commitment. Rather, civil commitment should be reserved for the mentally ill.[2]

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[2] An antisocial personality disorder is not a "mental illness," and does not justify indefinite commitment in a mental institution. *Foucha v. Louisiana*, 504 U.S. 71 (1992). Note also that the Kansas involuntary treatment statute expressly prohibits commitment where "the primary diagnosis is antisocial personality." K.S.A. 59-2902(o).

It is sometimes asserted that sex offenders fall within the DSM-IV classification of "paraphilias." Paraphilia is characterized by "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons...." DSM-IV, at 522-523.

A diagnosis of paraphilia does not require the presence of deviant behavior, but may be based solely on sexually arousing fantasies or sexual urges. DSM-IV at 522-523. Many (and probably most) individuals who suffer from paraphilias, including pedophiles, find lawful outlets for their sexual deviance and do not commit crimes. *Encyclopedia of Crime and Justice*, *supra*, at 1490.

A sex offender who satisfies the criteria for a paraphilia is not for that reason mentally ill. As stated by Schopp & Sturgis, *supra*, at 451-452:

> Neither sexual assault nor the paraphilias, including pedophilia, entail psychological aberration apart from the desire to perform such conduct and the

> willingness to act on that desire. These desires may be socially deviant in that they are directed toward socially aberrant content, but they provide no evidence of impaired capacities. That is, the mere fact that some individuals experience and act upon such desires does not support the contention that these individuals suffer impairment of the capacities ordinarily available to most people for use in understanding the relevant social constraints and directing their conduct in light of these constraints. **Insofar as mental illness means a pattern of impaired psychological capacities, these defendants as a group demonstrate none.** (Emphasis added)

The foregoing conclusion is supported by the DSM-IV, which distinguishes the paraphilias from disorders widely recognized as involving impairments, such as "mental retardation, dementia, personality change due to a general medical condition, substance intoxication, a manic episode or schizophrenia," even though such conditions may lead to aberrant sexual behavior. DSM-IV, at p. 525.

aberrant sexual behavior. DSM-IV, at p. 525.

Stated differently, a person suffering from schizophrenia, for example, who also engages in aberrant sexual behavior would be deemed mentally ill by virtue of the severe cognitive impairment associated with schizophrenia. A person whose disorder is defined solely by aberrant sexual behavior would not be seen in the same light. In the absence of a cognitive, perceptual or affective impairment which severely limits the person's ability to function in ordinary life, a diagnosis of "mental illness" would not be warranted.

There is nothing in the DSM-IV to indicate that a paraphilia, without more, causes an impairment in everyday functioning which would justify a diagnosis of mental illness.

CONCLUSION

The Association is well aware of the harm caused by violent offenders, and recognizes the magnitude and complexity of the problem facing our legislatures and our courts.

The legislation now before this Court creates a harm arguably worse than the

harm it seeks to prevent, for several reasons. By allowing the involuntary commitment of persons who are not mentally ill, the legislation not only undermines the sound medical underpinnings of involuntary commitment, but also undermines our fundamental conception of liberty by advancing the practice of preventive detention. Legislation of this type diverts resources from the treatment of persons who are truly mentally ill, and further stigmatizes the mentally ill because it encourages the belief that violent sex offenders and the mentally ill have something in common because both are subject to involuntary commitment.

Violent sex offenders who represent a long-term threat to public safety should receive sentences commensurate with their crimes. It does not facilitate a sound and responsible use of psychiatric knowledge to incarcerate such offenders only briefly, and then seek to re-incarcerate them under the guise of "commitment."

Offenders who are truly mentally ill can and should be committed under the Kansas involuntary treatment act, K.S.A.

59-2901, a fact which was recognized by the Kansas legislature when it enacted the statute at issue here. It is precisely because sex offenders are typically **not** mentally ill that the legislature took the remarkable and unfortunate step that it did.

The decision of the Kansas Supreme Court, holding that the Act is unconstitutional, should be affirmed.

Respectfully submitted this 12th day August, 1996.

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No. 95-1649

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

STATE OF KANSAS, *Petitioner,*

v.

LEROY HENDRICKS, *Respondent.*

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF KANSAS

BRIEF OF WASHINGTON LEGAL FOUNDATION; U.S. REPS. SAM BROWNBACK, JAN MEYERS, PAT ROBERTS, AND TODD TIAHRT; KANSAS LEGISLATORS TIM EMERT, MICHAEL R. O'NEAL, AND JENE VICKREY; FAMILIES & FRIENDS OF VIOLENT CRIME VICTIMS; THE MARYLAND COALITION AGAINST CRIME; AND THE STEPHANIE ROPER COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Date: August 19, 1996

25 pp

QUESTION PRESENTED

Amici address the following issue only:

Does the Kansas Sexually Violent Predator Act, Kan. Stat. Ann. § 59-29a01 *et seq.* -- which provides for the civil commitment and long-term care and treatment of sex offenders who are found beyond a reasonable doubt both (1) to be suffering from a mental abnormality or personality disorder; and (2) to present a continuing danger to society through a likelihood of committing future sexually violent offenses -- violate substantive due process principles?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-1649

STATE OF KANSAS, *Petitioner,*

v.

LEROY HENDRICKS, *Respondent.*

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF KANSAS

BRIEF OF WASHINGTON LEGAL FOUNDATION; U.S. REPS. SAM BROWNBACK, JAN MEYERS, PAT ROBERTS, AND TODD TIAHRT; KANSAS LEGISLATORS TIM EMERT, MICHAEL R. O'NEAL, AND JENE VICKREY; FAMILY & FRIENDS OF VIOLENT CRIME VICTIMS; THE MARYLAND COALITION AGAINST CRIME; AND THE STEPHANIE ROPER COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to criminal justice

reform and crime victims' rights. To that end, WLF has appeared before this Court as well as other federal and state courts in cases raising important criminal justice issues. *See, e.g., Felker v. Turpin,* 116 S. Ct. 2333 (1996); *United States v. Armstrong,* 116 S. Ct. 1480 (1996); and *Payne v. Tennessee,* 501 U.S. 808 (1991).

U.S. Representatives Sam Brownback, Jan Meyers, Pat Roberts, and Todd Tiahrt are Members of Congress from Kansas. They support the right of the State of Kansas to take appropriate measures to protect its citizens from the actions of sexually violent predators.

Sen. Tim Emert, Rep. Michael R. O'Neal, and Rep. Jene Vickrey are members of the Kansas legislature. All three played an active role in the legislature's adoption of the Kansas Sexually Violent Predator Act. Rep. O'Neal is Chairman of the House Judiciary Committee, which had jurisdiction over the Act prior to its adoption.

The Stephanie Roper Committee, Inc. is a nonprofit organization based in Upper Marlboro, Maryland, which was founded in 1982 by Roberta Roper, the mother of Stephanie, who was brutally kidnapped, raped, tortured, and murdered. The Committee has worked for the adoption of victim rights legislation, both at the state and federal levels. The Committee (together with its sister organization, the Stephanie Roper Foundation, which has more than 11,000 members in all 50 states) provides a broad array of services to crime victims.

The Maryland Coalition Against Crime is based in Baltimore, Maryland and works for enactment of legislation that promotes tougher law enforcement measures and the rights of crime victims. It devoted considerable resources

toward adoption of the "Victims' Rights Amendment" to the Maryland Constitution.

Families & Friends of Violent Crime Victims is a nonprofit organization providing assistance, support, and information to thousands of victims each year throughout the State of Washington. The organization was formed in 1975 following the tragic disappearances and deaths of several Seattle area girls. Families & Friends has been a supporter of the State of Washington's sexual predator law, which was the model for Kansas's legislation and which was recently declared unconstitutional by a federal district judge.

Amici are deeply concerned by the level of sexually oriented violent crime being committed in our society. Statistics indicate that those committing such crimes tend to be repeat offenders who have demonstrated an inability to control their antisocial behavior. *Amici* believe that the only way to protect the general public from such crimes is to incapacitate those shown highly likely to commit such crimes until they can be taught to conform their conduct to societal norms.

Amici submit this brief in support of Petitioner with the written consent of both parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case contained in Petitioner's brief.

In brief, Respondent Leroy Hendricks is a 62-year-old man who has molested children throughout his adult life.

In 1955, he pleaded guilty to indecent exposure after exposing his genitals to two young girls. In 1960, he was imprisoned for three years for molesting two young boys while he worked for a carnival. Soon after his release in 1963, he was arrested for molesting a seven-year-old girl and again imprisoned. He was imprisoned from 1967 to 1972 for molesting another young boy and girl. He began molesting his stepchildren soon after his release in 1972, and continued doing so until his conviction and incarceration in 1984. Petition Appendix (Pet. App.) 30a. He remained in prison based on that latest crime until his scheduled release date in 1994.

The Kansas legislature adopted in 1994 the Kansas Sexually Violent Predator Act (the "Act"), Kan. Stat. Ann. § 59-29a01, *et seq.*, to address the public safety problems caused by recidivist sexual offenders. The Act provides for the incapacitation and treatment (with a goal of eventual release) of anyone found to be a "sexually violent predator." The Act defines a "sexually violent predator" as anyone:

(1) who has been "convicted or charged with a sexually violent offense" and

(2) "suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence."

K.S.A. § 59-29a02(a). Included within the Act's definition of "sexually violent offense" is at least one of the crimes of which Hendricks has been convicted. K.S.A. § 21-3503. The Act includes numerous procedural safeguards for those subject to its terms, including the right to counsel during any commitment proceedings, the right to a jury trial, and

a prohibition against incapacitation unless the person subject to the law is found "beyond a reasonable doubt" to be a "sexually violent predator." Pet. App. 7a-8a.

Those incapacitated under the Act have the right to treatment of their mental abnormality/personality disorder and to release as soon as their mental condition "has so changed that the person is safe to be at large." K.S.A. § 59-29a07. Continued incapacitation is subject to mandatory annual review; if the court conducting the review determines that probable cause exists that the incapacitated person "will not engage in acts of sexual violence if discharged," the person is entitled to a hearing with the full panoply of procedural protections that were in place for the initial hearing. K.S.A. § 59-29a08.

In 1994, as Hendricks was about to be released from his most recent criminal incarceration, Kansas brought proceedings against him under the Act. At his incapacitation hearing, Hendricks stated that when he gets "stressed out" he is "unable to control the urge to engage in sexual activity with children," and that he is a pedophile who is "not cured of the condition." Pet. App. 3a.

Following the hearing, the jury found "beyond a reasonable doubt" that Hendricks is a "sexually violent predator," and the presiding judge ordered Hendricks committed to Larned State Hospital. *Id.* at 4a. Hendricks remains at Larned to this day, where he continues to receive treatment for his mental abnormality/personality disorder.

Hendricks appealed the commitment order to the Kansas Supreme Court. The appeal challenged the constitutionality of the Act on various grounds, including that the Act fails to provide substantive or procedural due process

and equal protection of the laws, is void as overly broad and vague, and violates the prohibition against double jeopardy and *ex post facto* laws. *Id.* at 9a. The Kansas Supreme Court reached only the substantive due process issue; it struck down the Act (by a 4-3 vote) as a violation of the substantive due process right to be free from unwarranted restraints on personal liberty. Pet. App. 1a-59a. Citing this Court's decision in *Foucha v. Louisiana,* 504 U.S. 71 (1992), the Kansas court held: (1) the Due Process Clause prohibits civil detention in the absence of a finding that the detainee is *both* mentally ill and dangerous; and (2) the finding that Hendricks has a "mental abnormality or personality disorder" is insufficient to demonstrate that he is mentally ill. *Id.* at 17a-20a.

In granting both the certiorari petition and Hendricks's cross-petition, the Court has agreed to address not only the substantive due process issue but also two issues the Kansas Supreme Court declined to address: whether the Act violates the constitutional prohibitions against *ex post facto* laws and double jeopardy. *Amici* address only the substantive due process issue.

SUMMARY OF ARGUMENT

Kansas contends that the Act does not violate substantive due process rights because it permits civil detention only after the State has demonstrated *both* that the detainee would be dangerous if set free *and* that the detainee's dangerousness derives from a mental illness. Kansas contends that a showing that a person suffers from a diagnosable "mental abnormality or personality disorder" is a sufficient showing of "mental illness" to satisfy whatever restrictions the Fourteenth Amendment's Due Process Clause imposes on a state's power to impose civil restraints

on individual liberty. Petitioner's Brief at 37-49. *Amici* fully support that argument.

Amici would go one step further regarding a state's power to impose such restraints. *Amici* submit that a state's interest in protecting its citizens from crime is sufficiently compelling that, in appropriate circumstances, it may incapacitate those found highly likely to commit crimes of violence. A state's interest in protecting its citizens does not vary depending on whether a dangerous individual happens to suffer from mental illness. Accordingly, it makes no sense to prevent a state from protecting its citizens from an individual shown to be virtually certain to commit violent crimes in the future, simply because the individual happens to be sane.

Amici recognize that preventive detention laws pose a serious threat to individual liberty unless carefully circumscribed. *Amici* do not support the right of a state to incapacitate an individual indefinitely based solely on ill-defined fears that the individual might break the law in the future. Nonetheless, such laws are permissible provided: (1) they are limited to cases in which the legislature has a strong basis for predicting the detainee's dangerousness; (2) they are not designed to punish past misbehavior; and (3) the detention is subject to mandatory periodic review.

The Kansas Sexually Violent Predator Act meets all of those requirements. The Act does not mandate preventive detention for all dangerous individuals, only for those who are highly likely to commit violent sex crimes -- a crime which the Kansas legislature has found to be subject to very high recidivism. The Act ensures that only the most dangerous individuals are detained, by limiting potential detainees to those who: (1) have been convicted or

charged with a sexually violent offense; and (2) suffer from either a "mental abnormality or personality disorder" which makes them likely to commit sex crimes. Nothing in the Act suggests an intent to punish individuals for past misconduct; the Act speaks only of a desire to prevent future crime, and Hendricks has produced no evidence suggesting a basis for doubting the Kansas legislature's good faith on that score. Finally, the duration of detention under the Act is strictly limited; those detained must be released as soon as they are "safe to be at large," and in no event may they be held for more than one year unless a judge has reviewed their situations and found them to be a continued threat to public safety.

The Court has repeatedly upheld civil commitment and other significant restraints on personal liberty without regard to whether those committed are mentally ill. The Kansas Supreme Court's holding that due process limits civil commitment to the mentally ill is a misreading of *Foucha* and other decisions of this Court.

ARGUMENT

I. DANGEROUS INDIVIDUALS DO NOT POSSESS A SUBSTANTIVE DUE PROCESS RIGHT TO BE FREE FROM PREVENTIVE DETENTION OF LIMITED DURATION

The Due Process Clause of the Fourteenth Amendment provides that "No State shall . . . deprive any person of life, liberty, or property without due process of law." In general, that clause has been understood to require *procedural* fairness before the government may take an action depriving a person of life, liberty, or property. *See, e.g., Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

But the Court has recognized that the Due Process Clause also includes a categorical prohibition against certain extreme forms of government conduct that result in deprivation of life, liberty, or property. This categorical prohibition, generally referred to as "substantive due process," "prevents the government from engaging in conduct that 'shocks the conscience' . . . or interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno,* 481 U.S. 739, 746 (1987)(quoting *Rochin v. California,* 342 U.S. 165, 172 (1952), and *Palko v. Connecticut,* 302 U.S. 319, 325-326 (1937)). *Amici* submit that there is nothing "shock[ing to] the conscience" about a law that permits a state to protect its citizens by imposing finite periods of detention on those who have been found beyond a reasonable doubt to be highly likely to commit sexually violent crimes if not detained.

Amici recognize that individual liberty is a value deeply rooted in American society. Nonetheless, the federal and state governments have regularly countenanced significant restraints on individual liberty where society's interests in imposing such restraints have been deemed sufficiently weighty. No one seriously questions, for example, that government may constitutionally incarcerate those found to have violated the criminal laws, or that government has broad discretion to define what constitutes criminal conduct.

In the civil context as well, the Court has regularly upheld the government's power to require the sacrifice of individual liberty for the sake of the common good. For example, in *Arver v. United States,* 245 U.S. 366 (1918), the Court rejected claims that conscription into the armed forces violated substantive due process, even in times of war. The Court has also upheld compelled vaccinations de-

signed to promote the public health, despite objections that vaccinations can result in permanent injury and death. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). The Court explained:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.

Id. at 26. *Jacobson* also recognized the right of government to hold citizens in quarantine against their will in order to prevent the spread of disease. *Id.* at 29. *See also O'Connor v. Donaldson*, 422 U.S. 563, 582-583 (1975) (Burger, C.J., concurring)("There can be little doubt that in the exercise of its police powers a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.").

Given that protecting citizens from crime is one of the most important functions of government, there could be little justification for prohibiting governments from imposing reasonable restraints on individual liberty in order to carry out that function. As the Court has recognized in *Schall v. Martin*, 467 U.S. 253 (1984), "The 'legitimate and *compelling* state interest' in protecting the community from crime cannot be doubted." *Schall*, 467 U.S. at 264 (quoting *De Veau v. Brainsted*, 363 U.S. 144, 155 (1960))(emphasis added). *Schall* rejected a substantive due process challenge to a New York law that permitted pre-trial detention of those charged with juvenile offenses.

The Court has recognized that determining how far government may go in sacrificing individual liberty in pursuit of the common good entails a balancing process:

> In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance "the liberty of the individual" and the "demands of organized society." *Poe v. Ullman*, 367 U.S. 497, 542 (1961)(Harlan, J., dissenting). In seeking this balance in other cases, the Court has weighed the individual's interest in liberty against the State's asserted reasons for restraining individual liberty.

Youngberg v. Romeo, 457 U.S. 307, 320 (1982).

This balancing process was played out in detail in *Salerno*, in which the Court upheld pretrial detention of those charged with serious federal crimes as a means of preventing them from committing additional crimes. Among the factors cited by the Court as tipping the balance in favor of upholding the pretrial detention law were: (1) the detention was limited in duration -- it could not continue beyond trial; (2) only those charged with particularly serious crimes could be held; and (3) the government was required to show that the detainee presented a demonstrable danger to the community and that no conditions of release would reasonably assure community safety. *Salerno*, 481 U.S. at 750. The Court noted:

> There is no doubt that preventing danger to the community is a legitimate regulatory goal. . . . We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest.

Id. at 747-748.[1]

Each of the three factors cited by *Salerno* as tipping the balance in favor of civil detention in that case are present in this case. First, no one may be indefinitely committed under the Act. Rather, one year is the maximum amount of time that an individual can be forced to remain incapacitated pursuant to a single judicial proceeding. If Kansas wishes to continue the detention beyond one year, the presiding judge must determine that there is *no probable cause* to believe that the detainee no longer presents a danger, or the finder of fact must again determine *beyond a reasonable doubt* that the detainee is a sexually violent predator. Moreover, the detainee is entitled to immediate release under the Act if, at any time, (s)he is adjudged "safe to be at large." K.S.A. § 59-29a07.

Second, the Act is limited to a very small class of dangerous individuals: those who are likely to commit violent sex crimes. The Kansas legislature has not engaged in a blunderbuss effort to sweep all potential undesirables from the streets; rather, it has focused its attention on a particularly destructive type of violent crime and on a group the legislature has found to be particularly prone to recidivism. As the Court recognized in *Schall*, the government's interest in preventive detention is particular strong

[1] Among the cases cited by the Court for that proposition were *Ludecke v. Watkins*, 335 U.S. 160 (1948)(approving unreviewable executive power to detain enemy aliens in time of war); *Moyer v. Peabody*, 212 U.S. 78, 84-85 (1909)(rejecting due process claim of individual jailed without probable cause by Governor in time of insurrection); and *Carlson v. Landon*, 342 U.S. 524, 537-542 (1952) (detention of potentially dangerous resident aliens pending deportation proceedings). *Salerno*, 481 U.S. at 748.

when those being detained are part of a group with high rates of recidivism. *Schall*, 467 U.S. at 265.

Third, the Act limits civil detention to those few for whom an extremely strong showing of dangerousness can be made. The Act's "beyond a reasonable doubt" standard of proof (a much stricter standard than the "clear and convincing evidence" standard often used in commitment statutes) significantly limits the group of dangerous individuals who can be made subject to the Act. Moreover, the Act requires significantly more than evidence of past bad acts in order to prove a likelihood of future misconduct. Kansas must also demonstrate that the propensity to commit violent sex crimes is based on a "mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." K.S.A. § 59-29a02(a). Tying the finding of future dangerousness to medical evidence regarding the detainee's mental condition significantly improves the precision of the dangerousness prediction at the same time that it restricts the pool of those subject to detention.[2]

Amici recognize that no prediction of future dangerousness can be 100% accurate. But as the Court has recognized, the potential imprecision of such predictions is not grounds for prohibiting all government action. For

[2] By pointing approvingly to the "mental abnormality or personality disorder" requirement, *amici* do not mean to suggest that some type of mental defect need be demonstrated in order to justify civil detention. Rather, *amici* view that requirement as simply one method by which a state can tip the constitutional balance in favor of a preventive detention measure, both by narrowing the potential for intrusion on individual liberty and by increasing the likelihood that detention will actually promote public safety.

example, while recognizing uncertainty among psychiatrists regarding whether a mentally ill person who has committed a criminal act is likely to commit additional criminal acts (and thus whether the person should be civilly committed based on dangerousness), the Court in *Jones v. United States*, 463 U.S. 354 (1983), rejected claims that such uncertainty prohibits legislatures from addressing the issue:

> We do not agree with the suggestion that Congress' power to legislate in this area depends on the research conducted by the psychiatric community. We have recognized repeatedly the "uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment. . ." *Greenwood v. United States*, 350 U.S. 366, 375 (1956). . . . The lessen we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments.

Jones, 463 U.S. at 364 n.13. *See also Schall*, 467 U.S. at 278 ("Our cases indicate. . . that from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct.").

Finally, there is no indication that Kansas adopted the Act as an indirect method of imposing additional punishment on convicted criminals -- a purpose, *amici* submit, that would violate substantive due process principles as well as the prohibition against double jeopardy. The Act speaks only of the desire to prevent future crime. The public outcry that led to adoption of the Act arose not because of a perception that those committing violent sex

crimes were being insufficiently punished, but because public safety was being endangered by the State's inadequate efforts to keep dangerous people off the streets. *See* Respondent's Brief at 5-6. In the absence of evidence that the Act "promotes either of the traditional aims of punishment -- retribution and deterrence" (*Allen v. Illinois*, 478 U.S. 364, 370 (1986)), there is no reason to view the Act as anything other than a civil statute designed to deter crime.

In sum, Hendricks has failed to demonstrate that Kansas's curtailment of his individual liberty under the facts of this case "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (*Salerno*, 481 U.S. at 751 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) or otherwise "shocks the conscience" (*id.* at 746); accordingly, his continued detention does not violate his substantive due process rights.[3]

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[3] The Court has stated that "evidence that a practice is followed by a large number of states . . . is plainly worth considering in determining whether the practice" offends basic principles of justice and thus violates substantive due process. *Schall*, 467 U.S. at 268. It is worth noting, therefore, that laws prescribing civil commitment for sex offenders have a lengthy pedigree in this country. As Kansas notes (Petitioner's Brief at 23), by 1960 at least 26 states had adopted some form of civil commitment law for sex offenders. The Court rejected a due process challenge to one such law, in *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940). As the *amicus curiae* brief filed by the State of Washington, *et al.*, indicates, a number of states have in recent years adopted laws substantially similar to the Kansas Sexually Violent Predator Act. It is difficult to believe that so many state legislatures would have adopted such laws if such laws objectively could be said to offend our nation's basic notions of justice.

II. NEITHER *ADDINGTON* NOR *FOUCHA* ESTABLISHES MENTAL ILLNESS AS A PREREQUISITE FOR CIVIL COMMITMENT

Key to the Kansas Supreme Court's decision to strike down the Act was its holding that due process prohibits civil detention in the absence of findings that the detainee is *both* mentally ill and dangerous. The court based that holding on *Foucha v. Louisiana*, 504 U.S. 71 (1992), and to a lesser extent, on *Addington v. Texas*, 441 U.S. 418 (1979). The Kansas court misconstrued both opinions.

Addington involved a challenge to a Texas statute that permitted involuntary commitments to state mental hospitals based on "clear and convincing evidence" that the those to be committed both were mentally ill and posed a danger to themselves or others. The case turned on the proper standard of proof. The detainee argued that due process demanded that no commitments should be made on less than a "beyond a reasonable doubt" standard of proof, but the Court upheld Texas's use of a "clear and convincing" standard of proof. *Addington*, 441 U.S. at 431.

A number of courts -- including the Kansas Supreme Court in this case (Pet. App. 11a-12a) -- have erroneously interpreted *Addington* as holding that civil detention is never permitted in the absence of findings of both mental illness and dangerousness. *Addington* held no such thing. Rather, the Court merely stated that "[u]nder the Texas Mental Health Code" Texas had no interest in confining someone in a mental hospital in the absence of findings of both mental illness and dangerousness. *Id.* at 426. That statement was an unremarkable interpretation of Texas law; in any event, it is difficult to fathom why a state would want to place someone who is not mentally ill in a facility

designed to treat the mentally ill. But *Addington* cannot be read as prohibiting all civil detention among those not adjudged mentally ill; to interpret it in this manner would be to assume that the Court was intending to overrule *sub silentio* all the case (cited above) that have upheld civil detention in the absence of a mental illness finding.[4]

The Kansas Supreme Court's reading of *Foucha* was equally misguided. *Foucha* involved a challenge to the continued confinement of an individual acquitted of burglary charges by reason of insanity, following a post-trial determination that the individual was no longer mentally ill. This Court held that due process prohibited Louisiana from continuing to confine Foucha based solely on his failure to demonstrate that he was no longer dangerous. *Foucha*, 504 U.S. at 81-82.

Foucha contains language indicating that civil detention of those not mentally ill is disfavored under the Due Pro-

---

[4] Such an interpretation of *Addington* is particularly implausible when one considers that its author, Chief Justice Burger, just four years earlier in *O'Connor* stated that "[t]here can be little doubt" that "a State may confine individuals solely to protect society from the dangers of significant antisocial acts." *O'Connor*, 422 U.S. at 582-583 (Burger, C.J., concurring). Moreover, one would have expected the Court to provide some explanation if it really had intended to adopt such a novel and seemingly illogical rule. It makes little sense to decree that neither a state's interest in protecting its citizens nor its *parens patriae* interest in providing treatment to the mentally ill is *ever* sufficient by itself to justify civil detention -- yet also to decree that the two interests, when combined, for some reason *are* sufficient to withstand substantive due process challenge. Logic suggests that as the threat to public safety continues to increase, at some point a state's interest in protecting its citizens would be sufficient by itself to tip the constitutional balance in favor of civil detention.

cess Clause (*see, e.g., id.* at 84 & n.6), and that language is obviously relevant to this case. But *Foucha* affirmed *Salerno*'s holding that civil detention is fully justified in appropriate circumstances even in the absence of a mental illness finding. *Id.* Accordingly, the Kansas Supreme Court clearly misread *Foucha* in reading into that decision a mental illness requirement for civil detention.

Moreover, the facts in *Foucha* are sufficiently distinguishable from the facts of this case as to render *Foucha* largely inapposite. In particular, the *only* finding in *Foucha* that bore even remotely on Foucha's future dangerousness was the not-guilty-by-reason-of-insanity verdict in his initial criminal case. But while that verdict indicated that on one occasion Foucha had committed a crime, evidence of one bad act in the past (standing alone) is a questionable evidentiary basis for a finding of future dangerousness. Moreover, the Louisiana courts had never required the State to provide any evidence of future dangerousness; rather, they ordered Foucha's continued confinement because *he* had failed to demonstrate that he was *not* dangerous. Thus, *Foucha* can best be seen as standing for the limited proposition that one is not subject to civil confinement when the state has neither proved that he is mentally ill nor proven that he is dangerous.[5]

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[5] *Foucha* distinguished *Salerno* by noting that civil detention in *Salerno* was limited to those charged with a small number of "the most serious of crimes," while Louisiana permitted detention of *all* insanity acquittees, regardless how minor the charge. *Foucha*, 504 U.S. at 81. In that respect, this case is far more akin to *Salerno* than to *Foucha*: Kansas has limited its detention statute to those likely to commit one extremely serious type of crime: violent sex crimes.

Finally, *Foucha*'s limited reach is underscored by the concurring opinion of Justice O'Connor, who provided the essential fifth vote for the Court's discussion of due process issues. Justice O'Connor made clear that her real objection to Louisiana's conduct was its continued treatment of Foucha as a mental patient after it had determined that he was not mentally ill. *Id.* at 88 (O'Connor, J., concurring in part and concurring in the judgment). She observed that the result might have been different if Louisiana had recognized that the only reason for holding Foucha was his dangerousness and had acted accordingly:

> Louisiana evidently has determined that the inference of dangerousness drawn from a verdict of not guilty by reason of insanity continues even after a clinical finding of sanity, and that judgment merits judicial deference.
>
> It might therefore be permissible for Louisiana to confine an insanity acquittee who has regained sanity if, unlike the situation in this case, the nature and duration of the detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness.

Id. at 87-88 (O'Connor, J., concurring in part and concurring in the judgment).

Kansas has followed Justice O'Connor's direction: it has tailored the nature and duration of the detention of those held pursuant to the Act to reflect, for the most part, concerns regarding the dangerousness of those being held. Accordingly, nothing in *Foucha* dictates the result reached by the Kansas Supreme Court.

CONCLUSION

Amici curiae respectfully request that the Court reverse the judgment of the Kansas Supreme Court.

Respectfully submitted,

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Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF OF THE STATES OF WASHINGTON, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, LOUISIANA, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT and WYOMING, THE COMMONWEALTHS OF KENTUCKY, PENNSYLVANIA, VIRGINIA and PUERTO RICO, THE DISTRICT OF COLUMBIA, THE TERRITORIES OF AMERICAN SAMOA and GUAM, THE NORTHERN MARIANA ISLANDS, and THE VIRGIN ISLANDS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

In July 1990, after extensive hearings involving the testimony of over 200 witnesses, Washington State enacted the nation's first Sexually Violent Predator Statute. This statute was enacted as part of the Community Protection Act of 1990 and provides for the indefinite civil commitment of sexual offenders who are about to be released from confinement and who are determined to suffer from a mental abnormality or personality disorder "which makes them likely to commit predatory acts of sexual violence." Wash. Rev. Code § 71.09.020. In August 1993, the Washington Supreme Court rejected challenges on substantive due process, equal protection, ex post facto, double jeopardy and procedural due process grounds and upheld the constitutionality of Washington's Statute. *In re Young*, 857 P.2d 989 (Wash. 1993).[1]

Since 1990, additional states have enacted similar statutes[2] and, as such, have a substantial interest in the outcome of this case. Certain of the amici are, as well, considering introducing similar laws. Some amici states have sexual predator civil commitment statutes which are substantively and procedurally somewhat different from the Kansas and Washington statutes--either older "sexual

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[1]The statute was subsequently declared unconstitutional on substantive due process, ex post facto and double jeopardy grounds by the federal district court in *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995). That case was appealed to the Ninth Circuit Court of Appeals and was argued in March 1996. The Ninth Circuit has announced that no further action will be taken on that case pending this Court's decision in the *Hendricks* case.

[2]Kan. Stat. Ann. § 59-29a01 *et seq.*; Wis. Stat. Ch. 980; Cal. Welf. & Inst. Code § 6600 *et seq.*; and Ariz. Rev. Stat. § 13-4601-4609.

psychopath" laws or more modern statutes.[3] All of the amici, however, share a common interest in protecting their citizens from sexually dangerous persons and assert that a narrowly focused civil commitment statute is an appropriate method to do so.

The State of Wisconsin is filing an amicus curiae brief, arguing that commitment under Kansas' Sexually Violent Predator Act does not constitute punishment, and does not violate constitutional prohibitions against ex post facto and double jeopardy laws. The State of Washington and amici approve and adopt amicus State of Wisconsin's arguments regarding ex post facto and double jeopardy.

ARGUMENT

KANSAS' SEXUALLY VIOLENT PREDATOR LAW FULLY COMPORTS WITH THE SUBSTANTIVE DUE PROCESS.

In 1994, Kansas enacted a sexually violent predator statute modeled on Washington's statute. Like Washington's statute, Kansas' Sexually Violent Predator Act provides for commitment of persons who have been convicted of or charged with a sexually violent offense and who suffer from a "mental abnormality or personality disorder"; a mental abnormality, in turn, is defined as:

> a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

Kan. Stat. Ann. § 59-29a02(b).

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[3] *See, e.g.*, Minn. Stat. § 253B.02, subd. 18b (1994) (newer law).

The Kansas Supreme Court struck down Kansas' Sexually Violent Predator Act, declaring that it permitted the detention of persons who, while dangerous, are not "mentally ill" in violation of this Court's holding in *Foucha v. Louisiana*, 504 U.S. 71 (1992). At the core of the question of the constitutionality of Kansas' law is the fundamental issue of whether a State, within reasonable limits, has the power to identify and define those mental conditions which, when combined with a showing of dangerousness, permit the State to civilly commit an individual for the safety of others. The Kansas Supreme Court's opinion is based on the flawed assumption that the State, in formulating laws related to the civil commitment of mentally disordered citizens, is restricted to specific or "medical" definitions of the term "mental illness." This Court, however, has never attempted to impose this requirement on the states. Instead, this Court has historically permitted the states, within reasonable limits, to identify and define those mental conditions which, when combined with a showing of dangerousness, merit civil commitment. Kansas' Sexually Violent Predator Act, by requiring proof of a mental abnormality or personality disorder which makes the individual likely to commit predatory acts of sexual violence, fully comports with the requirements of due process.

Kansas, and those other states which have adopted similar laws, have a compelling interest in protecting their citizens from mentally disordered sex offenders by confining them to secure facilities and by treating them so that they may eventually be safely released into the community.[4] These two goals are the primary

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[4] These amici concur with Kansas that strict scrutiny should not apply to the question of whether Kansas' Sexually Violent Predator Act comports with due process. Even if this Court were to apply such

justifications for the Statute. Kansas' Sexually Violent Predator Act is narrowly tailored to achieve this compelling interest by civilly committing for treatment a small group of clearly defined sex offenders who, by virtue of a mental abnormality or personality disorder, are dangerous to others. As such, the law satisfies constitutional standards.

A. Kansas' Sex Predator Statute Is Fundamentally Different From That Invalidated in *Foucha*.

The Kansas Supreme Court determined that the Kansas law, like the statute struck down by this Court in *Foucha*, permits the detention of persons not mentally ill on the basis of dangerousness alone. The court's reliance on *Foucha* is misplaced. The statute considered in *Foucha*, unlike Kansas' Sexually Violent Predator Act, contained no requirement of mental pathology whatsoever and is therefore fundamentally different than that at issue here.

In *Foucha*, this Court declared unconstitutional a Louisiana statute that governed the State's authority to detain insanity acquittees who, although not "mentally ill," were dangerous to themselves and others. Under Louisiana law, a person once committed as not guilty by reason of insanity remained committed until he could demonstrate that he was no longer dangerous. Louisiana Code of Crim. Proc. 654-58. After the initial commitment, there was no continuing requirement that the person committed be insane or mentally ill. Discharge after the initial commitment was dependent, not upon a restoration of sanity or mental health, but upon the person's ability to demonstrate that he presented no danger to himself or others. Finally, the individual, not the State, bore the burden of showing a lack of continued dangerousness.

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scrutiny, however, the Statute passes constitutional muster because it is narrowly tailored to serve a compelling state interest.

The *Foucha* Court considered a statute which was fundamentally different from the statute at issue here. The statute at issue (1) authorized indefinite detention in the absence of any showing of any mental pathology whatsoever, (2) placed the burden of showing the absence of dangerousness on the detainee, and (3) was being used to hold an individual whom all parties agreed was neither "mentally ill" nor "treatable."[5] In contrast, Kansas' law (1) requires that the State prove the existence of a mental pathology that has the specific effect of predisposing the individual to commit sexually violent crimes; (2) requires that this showing be made beyond a reasonable doubt (Kan. Stat. Ann. § 59-29a07(a)) to a unanimous jury (*Id.*); and (3) requires that persons subject to its terms be treated. Clearly, Terry Foucha could not be held under Kansas' law. In this case, however, the Kansas Statute is being applied to Leroy Hendricks, a pedophile with a 40 year history of sexual offenses against children who testified at trial that only his death would ensure that he would not reoffend. As the statutes are fundamentally different, so, too, are the individuals to whom they are being applied.

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[5]The uncontroverted evidence at trial was that Terry Foucha was "in good shape" mentally. *Foucha*, 504 U.S. at 74. A report submitted to the trial court stated that there had been "no evidence of mental illness since his admission." *Id.* The various physicians who had assessed Foucha determined, however, that Foucha suffered from an "antisocial personality, a condition that is not a mental disease and that is untreatable." *Id.* Thus, this Court began with the premise, not applicable here, that Foucha, although suffering from an "antisocial personality" and "dangerous," was *not* "mentally ill."

B. States Are Not Limited By Due Process To a Specific Or Narrow Definition of "Mental Illness" in Civil Commitment Statutes.

In concluding that the Kansas law permits the detention of persons not mentally ill, the Kansas Supreme Court appears to adopt the position that the term "mentally ill," as used by this Court, denotes a specific or precise medical condition. The court's holding suggests as well that a civil commitment statute, in order to withstand due process challenge, must use the term "mentally ill" to describe those to whom its terms apply or, in the alternative, must subscribe to a particular or "medical" definition of this phrase.

A review of this Court's precedents, however, provides no support for these positions. This Court has never embraced a single definition of the term "mental illness" as used in the context of due process, much less required the states to use any particular label to denote the mental condition required for civil commitment. Over the years, this Court has upheld statutory schemes providing for civil commitment using a variety of formulations. The Court's restraint on this issue reflects both the Court's acknowledgement of the inexact nature of the science of psychology as well as the Court's historical policy of giving the states broad discretion, as part of their police power, to protect society against persons who are suffering from mental disorders and are dangerous to themselves or others.

1. This Court has historically used the term "mentally ill" interchangeably with a variety of terms identifying mental pathologies justifying commitment.

In *Foucha*, this Court invalidated a statute which permitted detention of persons who, while dangerous, were

not "mentally ill." In order to understand this result, however, it is critical to understand that the Court, throughout its history, has used the term "mentally ill" interchangeably with a variety of other terms descriptive of mental pathology and without reference to any precise or "medical" definition.

The Court first articulated this position in *Addington v. Texas*, 441 U.S. 418 (1979). In *Addington*, the issue before the Supreme Court was one of procedural due process: what standard of proof was required by the Fourteenth Amendment to involuntarily commit an individual for an indefinite period of time to a state mental hospital. Because all parties agreed that Addington was "mentally ill," the Court neither discussed nor attempted to define the term "mental illness." Throughout the opinion, however, the Court used a variety of terms interchangeably. For example, the Court described the State's interest as follows:

> The State has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of *emotional disorders* to care for themselves. The State also has authority under its police powers to protect the community from the dangerous tendencies of some who are *mentally ill*. . . . The expanding concern of society with problems of *mental disorders* is reflected in the fact that in recent years many states have enacted statutes designed to protect the rights of the *mentally ill*.

Addington, 441 U.S. at 426 (emphasis added).

Since *Addington*, the Court has continued to use a variety of such terms and phrases interchangeably. In *Jones v. United States*, 463 U.S. 354 (1983), the Court, for

example, used the term "mental illness" interchangeably with "insanity." 463 U.S. at 363. Two years later, the Court, in considering the civil commitment proceedings under Illinois' Sexually Dangerous Persons Act, referred to the statutorily defined "mentally disordered" sexually dangerous persons as a part of "the larger class of *mentally ill* persons who might be found sexually dangerous." *Allen v. Illinois*, 478 U.S. 364, 370 (1986) (emphasis added). In *United States v. Salerno*, 481 U.S. 739 (1987), the Court approved the detention of "*mentally unstable* individuals who present a danger to the public." *Id.* at 748-49 (emphasis added). More recently, in *Washington v. Harper*, 494 U.S. 210 (1990), the Court considered a statute that permitted the State to administer involuntary treatment with antipsychotic drugs to prisoners who suffered from a "mental disorder." Although the hospital policy at issue spoke in terms of the treatment of persons with "mental disorders," the Court refers throughout its opinion to the treatment of the "mentally ill." *Id.* at 213, 227.

This Court has, over the course of the last 17 years, used a variety of terms without any precise definition to describe that mental condition required for civil commitment. Nothing in these opinions requires that Kansas use a specific term to describe the mental pathology of sexual predators it seeks to civilly commit, or to define that pathology in any specific, or "medical" way.

2. The psychiatric profession does not use any single, uniform definition of "mental illness."

The fact that the term "mental illness" is used interchangeably with any number of other phrases connoting mental imbalance is best explained by the fact

that the term "mental illness," although medical in origin[6] has, over the years, been largely abandoned by psychiatry. The American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) (DSM-IV), for example, includes no reference whatsoever to the term. Likewise, the Longman Dictionary of Psychology and Psychiatry defines "mental illness" simply as "mental disorder," and conversely defines "mental disorder" as "mental illness." Longman Dictionary of Psychology and Psychiatry 451 (Robert M. Goldenson ed., 1984).

That the concept is not uniformly defined is well illustrated by the varying definitions offered by the Washington State Psychiatric Association (WSPA).[7] A consistent proponent of the argument that, in order to satisfy due process, a commitment statute must comport with a medical definition of "mental illness," the WSPA submitted amicus curiae briefs before the Washington State Supreme Court, the federal district court, and the Ninth Circuit Court in the *Young* litigation. While repeatedly arguing for judicial adherence to a "medical" definition of "mental illness," the WSPA has, to date, failed to provide any evidence of the existence of such a definition and has,

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[6]The terms "mental illness" or "mental disease" were used in the 19th century to refer to a physical disease of the brain. Physicians believed that the strange hallucinations and emotions of the "insane" were caused or accompanied by anatomical or physiological changes in the brain. N. Dain, *Concepts of Insanity in the United States, 1789-1865*, 16, 26, 64, 70 (1964); I. Ray, *A Treatise on the Medical Jurisprudence of Insanity*, (1838).

[7]The parties to this litigation have been notified that the WSPA intends to submit an amicus curiae brief on behalf of Mr. Hendricks.

in fact, suggested no fewer than three different definitions of "mental illness."

Initially, in its amicus curiae brief to the Washington Supreme Court, submitted on behalf of Mr. Young in 1991, the WSPA defined mental illness as:

> a clinically significant behavioral or psychological syndrome or pattern that is associated with present distress, disability, suffering or loss of freedom.

Appendix A. This definition is, of course, essentially identical to the definition of *mental disorder* set forth in the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. rev. 1987) (DSM-III-R) and DSM-IV, where it is defined as:

> *clinically significant behavioral or psychological syndrome or pattern that* occurs in a person and that *is associated with present distress* (a painful symptom) or *disability* (impairment in one or more important areas of functioning) or with a significantly increased risk of *suffering*, death, pain, disability *or* an important *loss of freedom*.

DSM-III-R at xxii; DSM-IV at xxi (emphasis added).

Three years later, the WSPA submitted another amicus brief in the case of *Young v. Weston*, 898 F. Supp. 744, 750 (W.D. Wash. 1995). There, the WSPA argued for a definition of "mental illness," which essentially describes psychosis: "mental illness," the WSPA wrote, requires that the individual "must be suffering from severe cognitive impairments which create substantial and enduring loss of contact with reality" (Appendix B). Most recently, in its amicus brief submitted before the Ninth Circuit in *Young v. Weston*, WSPA asserted that

> it is widely understood in the psychiatric profession that to be identified as "mentally ill," a person must be suffering from a serious cognitive, perceptual or affective dysfunction which significantly impairs that person's ability to function in ordinary life.

Appendix C.

These various definitions illustrate the point that the mental health profession does not adhere to any single or uniform definition of the term "mental illness." The Court, of course, has long recognized this fact, noting that psychiatry is not "an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness." *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985); *see also O'Conner v. Donaldson*, 422 U.S. 563, 583 n.5 (Burger, C. J., concurring) (1975) ("Indeed, there is considerable debate concerning the threshold questions of what constitutes 'mental disease.'").

Even assuming that mental health professionals could agree upon a uniform definition of "mental illness," adoption of this definition for due process purposes would be a serious error. In the context of civil commitment, the term "mental illness" serves primarily a legal, not a medical, function. Law and medicine address different problems and serve different purposes:

> Medicine's purpose is to diagnose and cure individuals who are ill. While treatment may be a purpose of the law in civil commitment, the law also reflects broader, sometimes conflicting purposes including maintaining a peaceful and safe community. Accordingly, while the law ought to take into account medical and psychological knowledge in order to avoid becoming

> arbitrary, it must not let itself be unduly constrained by medicine. If the law refused to act beyond the frontiers of the scientific disciplines of biology, sociology or psychology, the law might well fail in its legal duties to punish, to compensate or to protect. Medicine and law should act at cross purposes as little as possible, but because each discipline is a separate discipline, some incongruity between categories, process, and the like is not only acceptable, but to be expected.

Katherine P. Blakey, Note, *The Indefinite Civil Commitment of Dangerous Sex Offenders Is An Appropriate Legal Compromise Between 'Mad' and 'Bad' - A Study of Minnesota's Sexual Psychopathic Personality Statute*, 10 Notre Dame J.L. Ethics & Pub. Pol'y 227, 259-60 (1996).

Within reasonable bounds, questions of the circumstances under which the mentally unstable and dangerous should be incapacitated for their own protection or the protection of society are issues of policy, not science. As such, they are appropriately left to those entities historically responsible for the formulation of such policy--the states.[8]

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[8]This issue has perhaps most frequently arisen in the context of the use of the insanity defense. Because "the choice of a test of legal insanity involves not only scientific knowledge but questions of basic policy . . .," *Leland v. Oregon*, 343 U.S. 790, 800 (1952), the formulation of that policy or policies is best left primarily to the legislative bodies of the various states. *Powell v. Texas*, 392 U.S. 514, 535-36 (1968) (plurality opinion) ("The doctrines of . . . [criminal responsibility] have historically provided the tools for a constitutionally shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the states.").

3. This Court has never embraced a single definition of the term "mental illness."

This Court has never attempted to restrict the states' power to civilly commit mentally disturbed persons by imposing a single, uniform definition of "mental illness" and has over the years upheld numerous statutes that formulate the requisite mental condition in a variety of ways.

In 1940, this Court upheld a statute that provided for the indeterminate commitment of sex offenders with a "psychopathic personality" in *Minnesota ex rel. Pearson*, 309 U.S. 270 (1940). The term "psychopathic personality" applied to persons

> who, by an habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of their uncontrolled and uncontrollable desire.

Id. at 273. The *Pearson* Court rejected the detainee's argument that this definition was unconstitutionally vague, writing that:

> these underlying conditions, calling for evidence of past conduct pointing to probable consequences, are as susceptible of proof as many of the criteria constantly applied in prosecutions for crime.

Id. at 274. Over 30 years later, the Court considered a statute authorizing commitment of persons "in need of specialized treatment for [their] *mental or physical*

aberration." Humphrey v. Cady, 405 U.S. 504, 507 (1972) (emphasis added). The states, this Court has noted:

> have traditionally exercised broad power to commit persons found to be mentally ill. The substantive limitations on the exercise

of this power and the procedures for invoking it vary drastically among the states.

Jackson v. Indiana, 406 U.S. 715, 736-37 (1972) (recognizing a number of bases for involuntary civil commitment, including "defective delinquency laws, sexual psychopath laws, [and] commitment of persons acquitted by reason of insanity").

What, then, are the substantive limitations to a state's powers to civilly commit? This Court has never articulated a precise standard, and has, indeed, repeatedly refused to do so. In *Addington*, a procedural due process case, the Court discussed those substantive limitations in the broadest possible terms:

> At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. However, there is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from *something more serious than is demonstrated by idiosyncratic behavior.*

441 U.S. at 426-27 (emphasis added). Clearly, under *Addington*, one may not be involuntary committed as "mentally ill" without "something more serious than is demonstrated by idiosyncratic behavior." *Addington* is unequivocal, however, that the judgment as to what constitutes "something more" is a question for the states:

> The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum.

441 U.S. at 431.

This refusal to "constitutionalize" standards for civil commitment and insistence upon deference to reasonable state determinations echoes earlier decisions of this Court. In *Powell v. Texas*, the Court explored the question of whether imposition of criminal sanctions for public intoxication upon a chronic alcoholic violated the constitutional prohibitions against cruel and unusual punishment. The plurality opinion emphasized that the Court had "never articulated a general constitutional doctrine of *mens rea*," 392 U.S. at 535, and it declined, as well, to enunciate a constitutional test for insanity. "Nothing," wrote Justice Marshall, "could be less fruitful for this court to be impelled into defining some sort of insanity test in constitutional terms." *Id.* To do so

> would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. *It is simply not yet the time to write into the*

> *constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or lawyers.*

Id. at 537 (emphasis added).

The law, whose function is to provide for an ordered society and to ensure consistent and equal treatment of those similarly situated, cannot be required to depend entirely upon "the shifting sands of academic thought." *In re the Care and Treatment of Hendricks*, 912 P.2d 129, 149 (Kan. 1996) (Larson, J., dissenting). Rather, the states must be permitted to enact laws that, within reason, define and identify those persons whom the state determines suffer from an ailment of the mind which renders that person dangerous. Particularly when a legislature:

> undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.

Marshall v. United States, 414 U.S. 417, 427 (1974).

C. The Kansas Supreme Court Erred in Concluding That the Statute Permits the Commitment of Persons Not "Mentally Ill."

The Kansas Supreme Court erred when it concluded, based on its misreading of *Foucha*, that, in using the terms "mental abnormality" and "personality disorder," the Legislature had effectively abandoned any requirement of mental illness. This conclusion misapprehends the Court's historical use of the term "mental illness" as well as the purpose and effect of Kansas' law. By adoption of the term "mental abnormality" and use of the established concept of "personality disorder," the Kansas Legislature sought only

to acknowledge the widely recognized fact that those suffering from severe sexual pathologies are distinct--both in the nature of their mental disorders and in their treatment needs--from those persons who are generally regarded as appropriate for commitment under existing involuntary treatment laws. This determination was entirely reasonable and is entitled to due deference. *Jones*, 463 U.S. at 705 n.13.

1. The Legislature appropriately sought to distinguish sex predators from persons subject to commitment under Kansas' general civil commitment statute.

In enacting the Sexually Violent Predator Act, the Kansas Legislature determined that the persons defined as sexually violent predators are inappropriate for involuntary commitment under Kansas' broad civil commitment statute, Kan. Stat. Ann. § 59-2902, and sought to differentiate them from that population. Sexually violent predators, wrote the Legislature, do not have a mental illness "which renders them appropriate for involuntary treatment pursuant to the Treatment Act for Mentally Ill Persons defined in Kan. Stat. Ann. § 59-2901 *et seq.*" *Hendricks*, 912 P.2d at 137. From this language, the Kansas State Supreme Court erroneously concluded, as a matter of due process, that "the Legislature recognizes that sexually violent predators are not mentally ill." *Id.* This conclusion is simply wrong. In the context of Kansas' Sexually Violent Predator Act, the term "mental illness" is not used with reference to any precise or specific medical definition, nor did the Legislature seek to suggest that these persons were not "mentally ill" for due process purposes.[9] Rather, the

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[9]Indeed, to suggest that the Legislature intentionally targeted persons not "mentally ill" for due process purposes is, in essence, to

term "mentally ill" is used simply to refer to those mental conditions that would constitute grounds for civil commitment under the State's general civil commitment law, Kan. Stat. Ann. § 59-2902.

2. Those sex offenders targeted by the statute suffer from recognized mental disorders.

The creation of a second involuntary commitment statute geared specifically towards violent sex predators was essential in order to address both the specific sexual pathologies and the special treatment needs of those persons. The Legislature, far from seeking to exclude the "mentally ill" from the Statute's parameters, sought rather to target a subset of that class, that is, pathologically driven sex offenders. These offenders suffer from a variety of different sexual disorders, or paraphilias. Some of these disorders, such as pedophilia or Sexual Sadism, are expressly included in the DSM-III and IV; others, such as pathologically driven rape, are not. As noted by Dr. Gene Abel, a psychiatrist at Emory University and leader in the field of sexual pathology, the disorders from which these offenders suffer are characterized by "compulsive, repetitive, driven behavior, which at times has no rational, logical rewards [and] appear to fit the criteria of an emotional or psychological illness."[10] That these conditions are properly regarded as mental disorders was again recognized by the Minnesota Supreme Court in *In re Blodgett*, 510 N.W. 2d 910 (Minn. 1994). Rejecting the

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impute to the Legislature an illicit or unconstitutional motive. *See* Petitioner's Brief at 42 n.27.

[10]Gene G. Abel & Joanne L. Rouleau, *Male Sex Offenders*, in *Handbook of Outpatient Treatment of Adults*, 271 (Michael E. Thase et al. eds., 1990).

detained person's claim that he was not "mentally ill," the court wrote:

> The argument against the constitutionality of civil commitment for a psychopathic personality is that the condition is not a mental illness, at least not one medically

recognized, or at least not yet. But while the term "psychopathic personality" is considered outmoded today, the reality it describes is not; this reality, even if it is not currently classified as a mental illness, does not appear to be a mere social maladjustment. . . . Whatever the explanation or label, the "psychopathic personality" is an identifiable and documentable violent sexually deviant condition or disorder.

Id. at 914-15.

The treatment needs of sex offenders are, as well, different than those generally committed under the State's broad civil commitment statute. While many acutely psychotic conditions that may result in civil commitment are responsive to various antipsychotic drugs,[11] conditions such as pedophilia, characterized by intense, recurrent urges, fantasies or behaviors involving sexual contact with children, are treated using a variety of approaches that do not, generally, include medication. Recognized treatment techniques include behavioral reconditioning, relapse prevention, cognitive-behavioral techniques, the enhancement of social skills, family systems approaches, and the addictive model. *See generally Treatment of the Offender, in Handbook of Sexual Assault: Issues, Theories and Treatment of the Offender*, 279-385 (W. L. Marshall et al. eds., 1990); *see also* Barbara K. Schwartz, *Effective Treatment Techniques for Sex Offenders*, 22 Psychiatric

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[11]*See Heller v. Doe by Doe*, 509 U.S. 312 (1993).

Annals 6 (June 1992). In contrast to the case of an acutely psychotic patient who often may be medicated and quickly returned to the community and maintained on medication, the treatment of chronic pedophiles or paraphiliac rapists, given the nature of the treatment modalities employed, is typically of a much longer duration.[12]

3. Kansas' Sexually Violent Predator Act acknowledges the different disorders and treatment needs of sexually violent predators.

The differences between sexually violent predators and those persons suitable for commitment under the State's broad civil commitment statute are reflected in the language and requirements of the Kansas statute. Whereas commitment under the Involuntary Treatment Act is intended to be short term and to return people to the community quickly, the treatment needs of sexually violent offenders is long term. Kan. Stat. Ann. § 59-29a01. Further, the methods of therapy used to treat those committed under Kan. Stat. Ann. § 59-2901 and those committed as sexually violent predators are very different: the "antisocial features" "generally" seen in violent sex offenders render this population "unamenable to existing mental illness treatment modalities." Kan Stat. Ann. § 59-29a01. Far from determining, as the Kansas State Supreme Court suggests, that sex predators are not "mentally ill," the Statute simply acknowledges the clear differences, widely recognized by experts in the assessment and

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[12]This is not to say, of course, that sexual disorders are entirely unresponsive to medication, particularly antiandrogen and hormonal treatment. *See, e.g., The Antiandrogen and Hormonal Treatment of Sex Offenders, in Handbook of Sexual Assault, supra*, at 297. There exists at this time, however, no consensus regarding the effectiveness of any particular drug therapy for repeat offenders.

treatment of sex offenders, between pathologically driven sex offenders and those suitable for commitment under the State's broad civil commitment statute. By establishing a system that provides for the specific treatment needs of serious sex offenders, the Statute promotes the intent of a *civil* statute: treatment and incapacitation.

a. The term "mental abnormality" has meaning to specialists in the treatment and assessment of sex offenders.

The Kansas State Supreme Court correctly notes that the term "mental abnormality" is not included within the DSM-IV and has no clinical definition. *Hendricks*, 912 P.2d at 137. This fact alone, of course, does not invalidate the Legislature's use of that term.

As noted by the *Young* court, "over the years, the law has developed many specialized terms to describe mental health concepts,"[13] and psychologists and psychiatrists are routinely called upon to apply psychological principles to terms of strictly legal or statutory origin. For example, within the context of a criminal proceeding, psychologists and psychiatrists are frequently asked to express an opinion as to whether a particular individual suffers from a "mental disease or defect," is "insane," or "competent." None of these terms has any direct analog in medicine.[14] It is clear, as well,

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[13]*Young*, 857 P.2d at 1001-02 n.5.

[14]Within the context of the criminal law and the insanity defense, the United States Courts of Appeal have repeatedly recognized that "mental illness" is a legal, not a medical category. *See, e.g., United States v. Freeman*, 357 F.2d 606, 622 (2d Cir. 1966) ("[A] test [for 'mental disease' for a criminal responsibility] which permits all to stand or fall upon the labels or classifications employed by testifying psychiatrists hardly affords the court the opportunity to perform its

that the term "mentally ill" in the context of an insanity defense and criminal responsibility may mean something quite different than "mentally ill" in the context of a civil commitment.[15] The question, then, for due process

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function of rendering an independent legal and social judgment."); *United States v. McDonald*, 312 F.2d 847, 850-51, (D.C. Cir. 1962) ("What psychiatrists may consider a 'mental disease or defect' for clinical purposes . . . may or may not be the same as mental disease or defect for the jury's purpose of determining criminal responsibility").

[15]Different legal definitions of "insanity" are employed in the law when different purposes are at stake. *See* Sanford H. Kadish & Stephen J. Schulhofer *Criminal Law and Its Processes: Cases and Materials* 929 (6th ed. 1995) ("Insanity can become an important legal issue in a variety of circumstances. A contract may be unenforceable if one of the parties was insane when the contract was made. A will may be held void if the testator was insane. In the criminal process, insanity can be relevant at several different stages. Of greatest importance to the substantive criminal law, insanity at the time of the offense is usually a defense to a criminal charge. In addition, a person who is insane may not be tried, convicted, or sentenced. Neither may such a person be executed if convicted of a capital offense. Further, under many state statutes, a person who becomes insane while in prison may be transferred to a mental hospital.").

Indeed, the Kansas Supreme Court, while on the one hand suggesting that there is one uniform definition of mental illness, tacitly admits to at least two:

> In addition, the State's own evidence is that Hendricks was being committed even though he does not suffer from mental illness. Hendricks is not mentally ill, and the criminal offenses for which he was imprisoned were not the result of mental illness. Therefore, as applied to Hendricks, the constitutionality of the Act depends upon a showing of dangerousness without a finding of mental illness.

Hendricks, at 20. The court appears to be saying that, because Hendricks was not found to be insane under that state's insanity statute, he cannot now be considered "mentally ill" for purposes of commitment

purposes, is not whether the term "mental abnormality" has a recognized clinical definition, but whether the term, given its statutory definition, has meaning to those mental health professionals, lawyers, judges and juries called upon to employ and interpret the term. The answer to this question is clearly "yes."

b. The term "mental abnormality" describes recognized mental pathologies.

In adopting the term "mental abnormality," the Kansas Legislature selected a term that has long been used by both the law and mental health professions[16] and is "as

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as a sex predator. By referring both to the test for criminal insanity, as well as to Kansas' standard for civil commitment, however, the court is expressly recognizing that at least *two* separate and distinct standards for civil commitment, or mental illness, exist in Kansas: The M'Naghten test, which provides that one is not guilty by reason of insanity if he or she "does not know the nature and quality of his act or where he does not know right from wrong with respect to that act," *State v. Baker*, 819 P.2d 1173, 1187 (Kan. 1991), and the standard for civil commitment under the State's general civil commitment statute. Thus, while the Kansas State Supreme Court tacitly acknowledges the peaceful coexistence of these two separate and distinct standards within Kansas commitment law, it erroneously rejects the possibility of yet a third standard, narrowly tailored to focus on a small group of mentally disordered persons who, because of their mental disorders, pose a serious risk of sexually violent harm to the citizens of that state. Nothing in this Court's due process jurisprudence required this result.

[16]*See, e.g., Palmer v. Ashe*, 342 U.S. 134, 136 (1952) (Palmer spent several years in an institution because of his "mental abnormality."); *O'Conner v. Donaldson*, 422 U.S. at 578 n.2 ("[T]he reality is that some mental abnormalities respond to no known treatment.") (Burger, C. J., concurring); *Humphrey v. Cady*, 405 U.S. 504, 510 n.6 (allowing commitment of persons dangerous "because of a mental or physical deficiency, disorder or abnormality"); *Dower v. Director Patuxent*, 396 F. Supp. 1070, 1081 (D. Md. 1975); *State v.*

susceptible of proof as many of the criteria constantly applied in prosecutions for crime." *Minnesota ex rel. Pearson*, 309 U.S. at 274-75. This is a term that incorporates a number of recognized mental pathologies:

> In using the concept of "mental abnormality" the Legislature has invoked a more generalized terminology that can cover a much larger variety of disorders. Some, such as the paraphilias, are covered in the DSM-III-R; others are not. The fact that pathologically driven rape, for example, is not yet listed in the DSM-III-R does not invalidate such a diagnosis. The DSM is, after all, an evolving and imperfect document. Nor is it sacrosanct. Furthermore, it is in some areas a political document whose diagnoses are based, in some cases, on what American Psychiatric Association ("APA") leaders consider to be practical realities. *What is critical for our purposes is that psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM.*

Young, 857 P.2d at 1002 (emphasis added) (quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U.

Ward, 369 N.W. 2d 293 (Minn. 1985) (dangerous to public because of his "mental or physical deficiency, disorder or abnormality"); *People v. Smith*, 486 P.2d 1213, 1215 (Ca. 1971) (on the question of whether Smith was a danger to the public because of a "mental or physical deficiency, disorder or abnormality").

Puget Sound L. Rev. 709, 733 (1992)). In Hendricks' trial, as well as the numerous trials that have been conducted in Washington since the statute's enactment in 1990, competent experts have been able to offer testimony regarding "the mental pathologies underlying the sex predator condition." *Young*, 857 P.2d at 1002.

At Hendricks' trial, Dr. Befort was able to both interpret and apply the definition of the term "mental abnormality" to arrive at a diagnosis--pedophilia--long accepted by the mental health community. Pedophilia is a type of mental disorder that is expressly recognized in the DSM-IV. DSM-IV at 527-28.

The published opinions of other sex predator cases also demonstrate that experts are able to reach recognized diagnostic categories using the statutory language. At the trial of Andre Young in Washington State, for example, the state's expert, a specialist with over 25 years experience with sex offenders, testified that Young suffered from a mental abnormality in the form of a paraphilia. *Young*, 857 P.2d at 994-95. A paraphilia is a type of mental disorder expressly recognized in the DSM. *See* DSM-IV at 522-25. Young's paraphilia took the form of either Sexual Sadism or Paraphilia Not Otherwise Specified (NOS): Rape. *Young*, 857 P.2d at 994. Sexual Sadism is, of course, a recognized diagnostic category within the DSM-IV. *See* DSM-IV at 530-31. All experts at Young's trial agreed, as well, that Paraphilia NOS: Rape was a legitimate diagnostic category.[17] Young's co-appellant,

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[17]The diagnosis of rape as a paraphilia is recognized as valid by experts in the field of the treatment and assessment of sex offenders. As explained in the seminal article on this mental disorder, read into the record at the *Young* trial:

> Clinical interviews of rapists, however, provide support for the classification of rape as a paraphilia,

Vance Cunningham, was determined by the State's expert to suffer from a severe Paraphilia NOS: Rape. *Id.* at 995.

The experience of the State of Wisconsin has been similar. In *State v. Post*, 541 N.W. 2d 115, 119 (Wis. 1995), Post was diagnosed as suffering from an antisocial personality disorder (DSM-IV at 645) with secondary atypical paraphilia (DSM-IV at 522-23). Post's co-appellant, Oldakowski, was diagnosed as suffering from both Sexual Sadism (DSM-IV at 530) and Exhibitionism (DSM-IV at 525-26) and secondarily from a Personality Disorder, Not Otherwise Specified (DSM-IV at 673). *Post*, 541 N.W. 2d at 119. In addition, William Carpenter was diagnosed as suffering from pedophilia and an antisocial personality disorder (DSM-IV at 645-50). *State v. Carpenter*, 541 N.W. 2d 105, 108 (Wis. 1995); Carpenter's co-appellant, William Schmidt, was diagnosed as a pedophile. *Id.* at 109. Accordingly, all available evidence points to the conclusion that mental health and legal professionals are able to work with the legislatively

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> because many individuals report having recurrent, repetitive, and compulsive urges and fantasies to commit rapes. These offenders attempt to control their urges, but the urges eventually become so strong that they act upon them, commit rapes, and then feel guilty afterwards with a temporary reduction of urges, only to have the cycle repeat again. This cycle of ongoing urges, attempts to control them, breakdown of those attempts, and recurrence of the sex crime is similar to the clinical picture presented by exhibitionists, voyeurs, pedophiles, and other traditionally recognized categories of paraphiliacs.

Gene G. Abel & Joanne L. Rouleau, *The Nature and Extent of Sexual Assault, in Handbook of Sexual Assault, supra*, at 9, 18, *cited in Young*, 857 P.2d at 1002; *see also* A. Kenneth Fuller, M.D., et al., *Paraphiliac Coercive Disorder, in* 16 *Journal of Sex Education and Therapy* 3, 164-71 (1990).

created and defined term "mental abnormality" in order to arrive upon well-established, widely recognized diagnoses accepted by others in the mental health professions.

c. The term "mental abnormality" fully complies with the requirements of substantive due process.

The Kansas Supreme Court suggests that the use of the terms "mental abnormality" and "personality disorder" was proof that the Legislature intended, contrary to due process, that the Statute capture those who were not actually mentally ill, by evoking a circular definitional structure in which "the only observed characteristic . . . is the predisposition to commit sex crimes." *Hendricks*, 912 P.2d at 19 (quoting *Young v. Weston*, 898 F. Supp. at 750).[18]

The court's suggestion that the terms "personality disorder" and "mental abnormality" are circular is inaccurate and suggests that the court does not understand the process by which psychiatric diagnoses are made. The mental health professions' understanding of the origin of mental disorders is incomplete: some conditions are known to have a biological or organic basis; in other cases, the etiology is unknown. DSM-III-R at xxiii. Because a psychologist cannot determine the presence of most mental disorders by, for example, taking a blood sample, the diagnosis of most disorders must be based, to a greater or lesser degree, on inference. Those inferences, in turn, are based on the data available to the clinician. Some of these

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[18]Hendricks' commitment is based exclusively upon the presence of a mental abnormality. As such, the issue of the constitutional sufficiency of a commitment based on a personality disorder alone is not presented by this case. Accordingly, this question will not be addressed in this brief.

data will be objective (e.g., in the case of a diagnosis of pedophilia, the information that an assault on a child has occurred); other data will be subjective (as, for example, in the case of a diagnosis of major depressive episode, the subjective presence of a depressed mood, DSM-IV at 339). The available data--both subjective and objective-- are then cross-referenced with the diagnostic criteria established by the profession and set forth in the DSM. DSM-III-R at 15-24. This is the process by which sexual disorders are diagnosed; it is also the process by which psychotic disorders and mood disorders are diagnosed. The DSM itself notes that these definitions of the various disorders

> can be said to be "descriptive" in that the definitions of the disorders are generally limited to descriptions of the clinical features of the disorders.

Id. at xxiii. In this sense, then, all psychiatric diagnosis is "circular." To suggest that this "circularity" is unique to the diagnosis of conditions forming the basis of the sex predator condition, or in some way renders an expert's determination that someone is a sexually violent predator meaningless, reveals a serious lack of understanding of the process by which all psychiatric diagnoses are reached.

CONCLUSION

Kansas' Sexually Violent Predator Statute, by providing for the civil commitment of persons suffering from mental abnormalities or personality disorders that make them likely to reoffend, fully complies with the requirements of due process. As such, the decision of the

Kansas Supreme Court should be reversed and the Statute upheld.

Respectfully submitted,

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APPENDIX A

From Brief of Amicus Curiae Washington State Psychiatric Association in Support of Petitioners submitted to the Washington State Supreme Court in *In re the Personal Restraint of: Andre Brigham Young and Vance Russell Cunningham*, cause no. 57837-1, on pages 2-3:

Mental illness is a clinically significant behavioral or psychological syndrome or pattern that is associated with present distress, disability, suffering, or loss of freedom. American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (Third Edition, Revised, 1987), p. xxiv. To label accurately any individual as "mentally ill" within the medical meaning of that term, a mental health professional must first diagnose that individual. Diagnosis requires an identification of symptoms and a comparison of those symptoms with clinically recognized diagnostic criteria. If the individual meets the diagnostic criteria set forth in the above-mentioned Manual (hereafter, the DSM III-R), the

individual can be diagnosed as suffering from a medically recognized mental disorder.

APPENDIX B

From Amicus Brief Submitted by Washington State Psychiatric Association on Behalf of Petitioner to the United States District Court, Western District of Washington at Seattle, in *Andre Brigham Young v. David Weston*, cause no. C94-480C, on pages 1-2:

It is well accepted in modern psychiatry that "mental illness" requires, as a threshold determination, the existence of a mental disorder. A mental disorder is a "clinically significant behavioral or psychological syndrome or pattern that is associated with present distress, disability, suffering, or loss of freedom." *Diagnostic and Statistical Manual* (Fourth Edition), published by the American Psychiatric Association, 1994, at p. xxiv.

To label accurately any individual as "mentally ill" within the medical meaning of that term involves a two step process. First, a mental health professional must diagnose that individual as suffering from a mental disorder. Diagnosis requires an identification of symptoms and a comparison of those symptoms with diagnostic criteria for

a medically recognized mental disorder as set forth in an authoritative text such as the above-mentioned Manual (hereafter, the DSM-IV).

If the individual is found to suffer from a mental disorder, it would next be determined whether the disorder is of a type and severity which would merit the label "mental illness" for the purpose of either voluntary or involuntary commitment in a psychiatric hospital for treatment.[1] The term "mental illness" is not widely used in psychiatry today, except in a forensic context where statute or case law requires a finding of mental illness as a prerequisite to involuntary commitment. Given this context, it is widely understood in the psychiatric profession that to merit the label "mentally ill", a person ordinarily must be suffering from severe cognitive

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[1]Some disorders, such as schizophrenia, commonly lead to a diagnosis of mental illness. Other mental disorders would rarely, if ever, lead to such a diagnosis; e.g., Caffeine Induced Sleep Disorder (DSM IV, p. 601).

impairments which create substantial and enduring loss of contact with reality.

APPENDIX C

From Brief of Amicus Curiae Washington State Psychiatric Association in Support of Petitioner/Appellee to the United States Court of Appeals for the Ninth Circuit in *Andre Brigham Young v. David Weston*, cause no. 95-35958, on page 2 and page 3:

Accurately labeling any individual as "mentally ill" involves a two step process. First, a mental health professional must diagnose that individual as suffering from a mental disorder based on diagnostic criteria as set forth in an authoritative text such as the DSM-IV.

If the individual is found to suffer from a mental disorder, it would next be determined whether the disorder is of a type and severity which would merit the label "mental illness" for the purpose of either voluntary or involuntary commitment in a psychiatric hospital for treatment. . . .

What, then, is necessary for a diagnosis of "mental illness?" In the context of involuntary commitment, it is widely understood in the psychiatric profession that to be

identified as "mentally ill," a person must be suffering from a serious cognitive, perceptual or affective dysfunction which significantly impairs that person's ability to function in ordinary life.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF KANSAS,

Petitioner,

v.

LEROY HENDRICKS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Kansas

BRIEF OF THE MENNINGER FOUNDATION, THE AMERICAN ALLIANCE FOR RIGHTS AND RESPONSIBILITIES, JUSTICE FOR ALL, THE NEW YORK CHAPTER OF PARENTS OF MURDERED CHILDREN, PROTECTING OUR CHILDREN, PEOPLE AGAINST VIOLENT CRIME, VICTIMS OUTREACH, INC., AND TEXANS FOR EQUAL JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1649

STATE OF KANSAS,

Petitioner,

v.

LEROY HENDRICKS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Kansas

BRIEF OF THE MENNINGER FOUNDATION, THE AMERICAN ALLIANCE FOR RIGHTS AND RESPONSIBILITIES, JUSTICE FOR ALL, THE NEW YORK CHAPTER OF PARENTS OF MURDERED CHILDREN, PROTECTING OUR CHILDREN, PEOPLE AGAINST VIOLENT CRIME, VICTIMS OUTREACH, INC., AND TEXANS FOR EQUAL JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The Menninger Foundation is a Kansas nonprofit corporation that operates the Menninger Clinic in Topeka, Kansas. The Menninger Clinic ("Menninger") was founded in 1925 and is now one of the nation's foremost psychiatric hospitals, consistently ranked as one of the top two psychiatric hospitals in the country by a *U.S. News & World Report* national survey of psychiatrists. Menninger provides a continuum of care to patients from all over the country, including patients who suffer from the types of mental abnormalities and personality disorders that the Kansas statute was enacted to address. Menninger can offer a uniquely informed perspective regarding the current state of the art in the diagnosis and treatment of sexually violent predators.

The American Alliance for Rights and Responsibilities ("AARR") is a national nonprofit organization founded to foster civic and community life and to promote individual responsibility. AARR has promoted and defended a variety of measures designed to improve the quality of urban life, focusing on measures targeted at reducing crime. AARR has previously appeared as *amicus curiae* in *Montana* v. *Egelhoff*, 116 S. Ct. 2013 (1996).

Justice for All is a national nonprofit volunteer organization, and Texans for Equal Justice is a state nonprofit volunteer organization. Both organizations are committed to the promotion of the rights and security of law-abiding citizens.

Parents of Murdered Children, New York Chapter, is a local chapter of a national organization formed to provide support for the surviving families of murder victims. Victims Outreach, Inc. is a nonprofit volunteer organization in Texas that assists persons who are victims of violent crime. Both organizations support public policies that help to protect families and children from violence.

Protecting Our Children is a volunteer organization in New York State that promotes legislation that will help protect children from violent crime, such as "Megan's Law" (a statute requiring community notification when certain categories of convicted sex offenders are released into the community).

People Against Violent Crime is a Texas state organization organized with the purpose of seeking ways to reduce violent crime.

SUMMARY OF ARGUMENT

The first duty of government is to take reasonable measures to protect the public health and safety of its citizens. Reflecting settled English doctrine, American law at the time the Constitution was first adopted, as well as at the adoption of the Fourteenth Amendment, recognized both the power and the responsibility of the public authorities to confine persons whose medical or mental conditions posed a grave risk of injuring other persons. That contemporaneous practice guides the inquiry whether civil commitment of persons afflicted with dangerous diseases or abnormalities satisfies the guarantee of due process.

Kansas enacted the Sexually Violent Predators Act (the "Act" or the "SVP Act") to provide civil commitment and treatment for sexually violent predators ("SVPs"), defined by the Act as persons having certain mental abnormalities or personality disorders that make them dangerous to others. The law is not novel in that it reaches patients who historically could have been civilly committed under other statutes. The Act, however, represents Kansas' attempt to refine its civil commitment system to provide optimum mental health treatment and complementary procedures for two very different types of mental health patients, SVPs and the "mentally ill," as defined under Kansas' other civil commitment statute.

The SVP Act is consistent with the basic principle that has formed the cornerstone of American civil commitment law: it limits involuntary commitment to dangerous persons who, according to contemporary medical knowledge, have a condition that may benefit from the type of professional mental health treatment provided by the State. Civil commitment under these circumstances fits within the Constitution's guarantee of due process, since the nature of the commitment bears a reasonable relation to the purpose for which the individual is committed.

Kansas has attempted to strike an appropriate balance between its obligation to protect its citizens from sexual violence to manage adequately scarce state mental health resources. The State also has endeavored to ensure that SVPs are treated fairly in light of current psychiatric knowledge and prevailing notions of culpability. By permitting, in some cases, incarceration followed by civil commitment (instead of longer periods of incarceration), the State has recognized that SVPs are responsible for their harmful conduct, unlike the insane, but that SVPs may be less culpable than others, because SVPs suffer from a mental affliction that makes them less able to resist certain criminal impulses.

Neither does the Constitution or prevailing historical practice restrict State civil commitment power to conditions that fit some technical definition of "mental illness." Adopting such an approach would inexorably wed the constitutionality of civil commitment statutes to a single phrase — "mental illness" — thereby elevating that term to the status of "magic words." That course would be imprudent, since it would render State statutes hostage to the changing classifications used by the psychiatric profession, rigidly tie a constitutional principle to one view held by some in that profession, and unnecessarily limit the States' flexibility to craft policy that, in light of prevailing psychiatric knowledge and ideas of criminal culpability, balances their obligation to protect society, to deter criminal conduct, and to assist those who need help to help themselves.

The mental health profession only now is beginning to understand the complex and myriad factors that induce persons to engage in the type of antisocial behavior defined by the Act. Understandably then, there is some disagreement among psychiatrics as to how best to treat SVPs. There is virtually no disagreement among mental health professionals, however, that such persons could benefit from some form of professional mental health treatment. Deciding how best to resolve disagreements of this sort is a matter of legislative policy judgment, not a matter of constitutional dimension.

To violate substantive due process, the Act must violate some principle "'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Montana* v. *Egelhoff*, 116 S. Ct. 2013, 2015 (1996) (Scalia, J., plurality opinion) (quoting *Patterson* v. *New York*, 432 U.S. 197, 202 (1977)). But the Kansas legislature's decision to authorize custodial treatment of those persons who pose a danger to society and are in need of professional mental health treatment fits comfortably within this country's historical and contemporary practice — and is consistent with the fundamental principles that justify civil infringements of individual liberty generally. Due process demands no more.

I. THE DUE PROCESS CLAUSE DID NOT ABROGATE THE POWER OF THE STATES TO CONFINE CIVILLY THOSE PERSONS WHO, BASED ON CONTEMPORARY MEDICAL KNOWLEDGE, POSE A DANGER TO SOCIETY AND COULD BENEFIT FROM TREATMENT.

A. The Principle Upon Which the Kansas Law Is Based — the Government's Power to Protect Society From Persons Afflicted With Dangerous Physical or Mental Conditions — Has Substantial Historical Roots.

Individual liberty must occasionally yield to the State's obligation to protect its citizens, either from one another or from themselves. This central axiom of life in a civilized society raises a fundamental question — under what circumstances, outside of the criminal context, may a society restrict an individual's liberty for society's overall benefit? In answering this question, a page of history is surely worth a volume of philosophy and logic.

Blackstone stated that "every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish." 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *125 (1769). This is the legal consequence of John Donne's observation that "[n]o man is an island, entire of itself; every man is a piece of the continent, a part of the main." J. Donne, *Meditation*, in DEVOTIONS UPON EMERGENT OCCASIONS 17 (1624).

Because of the interdependence of individuals in a functioning society, by the time the Fifth Amendment's guarantee of "due process" was adopted it was well established that public authorities could confine persons who presented a grave threat to public health and safety. The founders of the American legal system knew that, for centuries, the law of England allowed magistrates and sheriffs to enforce confinement of carriers of dangerous diseases such as the plague. See, *e.g.*, R. DALTON, THE COUNTREY JUSTICE (1655) (one of six definitive legal treatises ordered by the Massachusetts General Court as a basis for framing the colony's first "Laws and Liberties"). Similarly, Blackstone reported that offenses "against the public *health* of the nation" reflected a "concern of the highest

importance," pointing specifically to statutes allowing civil authorities to order forcible confinement of "any person infected with the plague" as long as he remains "infectious." 4 BLACKSTONE at *161 (emphasis in original).

American practice has followed this principle of government throughout our constitutional history. The Colonies and then the States regularly exercised the power to confine persons afflicted with dangerous conditions until they no longer posed a menace to public health and safety. See generally 39 C.J.S. *Habeas Corpus* § 133 (1976) (discussing early cases). The Court, for example, has sustained quarantines and compelled vaccinations to protect the public from possible exposure to disease. See, *e.g.*, *Compagnie Francaise* v. *Louisiana State Bd. of Health*, 186 U.S. 380, 387 (1902) (quarantines); *Jacobson* v. *Massachusetts*, 197 U.S. 11, 30-31 (1905) (vaccinations). In the same year in which the Fourteenth Amendment was adopted, Cooley described such "quarantine regulations and health laws" as an inherent manifestation of "the police power of the States." T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 584 (1st ed. 1868).

The law also authorized private citizens to use force to protect the community as well as the individual from imminent danger. By the middle of the nineteenth century, for example, it was well-settled that a private person, without warrant, could lawfully "restrain a person who is fighting, or doing mischief, or disturbing a congregation, or has fallen in a fit, or is so sick as to be helpless, or is unconsciously going into great danger, or is drunk, or has delirium tremens." *Look* v. *Dean*, 108 Mass. 116, 120 (1871) (citing *Colby* v. *Jackson*, 12 N.H. 526, 530 (1842)); *Keleher* v. *Putnam*, 60 N.H. 30, 31 (1880) (noting the right "to seize and restrain any person incapable of controlling his own actions, whose being at large endangers the safety of others"). Thus, our law has always recognized that the States, and in certain circumstances individual citizens, have the authority to detain civilly those who presented a danger to public health and safety — without distinguishing between whether the threat was from contagious diseases or other physical or mental conditions. It is into this broad fabric of law that the thread of civil commitment is woven.

B. Civil Confinement Has Been Used to Protect Society or the Individual from Harm Threatened by Mental Disorders.

Our society has consistently asserted the power to prctect its citizens against any palpable danger, including danger flowing from a person's mental or psychological disorders. Changing times have witnessed changes in our understanding of underlying causes of dangerous mental disorders and effective responses to them, but society has been consistent in asserting the power and assuming the responsibility to address such threats by compulsion, if necessary.

1. *Civil Commitment for the Protection of Society.* During the Colonial period, governmental power, "in so far as it was extended to the mentally ill, was mainly directed to the problem of safely disposing of violent cases. Incarceration in jail was the common solution." A. DEUTSCH, THE MENTALLY ILL IN AMERICA 41 (5th prtg. 1965). A 1676 Massachusetts Act is typical of the civil commitment statutes applicable during this period:

> "Whereas, There are distracted persons in some tounes, that are unruly, whereby not only the familyes wherein they are, but others suffer much damage by them, it is ordered by this Court and the authoritye thereof, that the selectmen in all tounes where such persons are are hereby impowred & injoyned to take care of all such persons, that they doe not damnify others." DEUTSCH, *supra*, at 43; see also E.B. BEIS, MENTAL HEALTH AND THE LAW 3 (1984).

Confinement typically was imposed until the "distracted" person was no longer a threat to the community. The York County, Virginia, records of 1689, for example, recall an order pertaining to a "madman," John Stock,

> "whoe keepes running about the neighborhood day and night in a sad Distracted Condition to the great Disturbance of the people, therefore for the prevention of his doeing any further Mischeife It is Ordered by the Court that Mr. Robt. Read, High Sherr: doe take Care that the said Stock bee Lade hold of and safely kept in some close Roome, where hee shall not bee suffered to go abroad until hee bee in a better condition to Governe himselfe, and that ye said Robert Read is to pvide

such helps as may bee Convenient to Looke after him." DEUTSCH, *supra*, at 43.

Similarly, in 1720, one Henry Dove, "a Dangerous Madman," was ordered incarcerated in New York City jail "untill he shall Recover his senses." *Id.* at 42; see also S.J. BRAKEL, ET AL., THE MENTALLY DISABLED AND THE LAW 12 (3d ed. 1985). As these orders illustrate, commitment in Colonial America was not used for the purpose of treatment, but rather was merely a custodial device to deal with "community nuisances" that endangered the colonists' way of life. See BEIS, *supra*, at 3; BRAKEL, ET AL., *supra*, at 12.

Preventive detention of the dangerously disturbed remained the general rule in the States when the Constitution was adopted. In 1788, for example, New York enacted the following civil commitment law:

> "'*Whereas*, There are sometimes persons who by lunacy or otherwise are furiously mad, or are so far disordered in their senses that they may be dangerous to be permitted to go abroad; therefore
>
> *Be it enacted*, That it shall and may be lawful for any two or more justices of the peace to cause such person to be apprehended and kept safely locked up in some secure place, and, if such justices shall find it necessary, to be there chained. . . .'" DEUTSCH, *supra*, at 420 (quoting 1788 N.Y. LAWS ch. 31 (Feb. 9, 1788)).[1]

Terms such as "distracted person," "lunacy," and "mad" in early civil commitment statutes did not limit the reach of those statutes to particular forms of mental illness that threatened the lives and property of others. At the beginning of the nineteenth

[1] In 1797, Massachusetts enacted a virtually identical law, entitled "An act for suppressing Rogues, Vagabounds, Common Beggars and other idle, disorderly and lewd Persons," which authorized commitment to a house of correction of any person "'[l]unatic & so furiously mad as to render it dangerous to the peace or the safety of the good people, for such lunatic person to go at large.'" G. GROB, MENTAL INSTITUTIONS IN AMERICA: SOCIAL POLICY TO 1875 9 (1973) (quoting ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, 1796-97 451 (1896)); DEUTSCH, *supra*, at 420.

century, society knew very little about the diagnosis or treatment of mental illnesses. See DEUTSCH, *supra*, at 24-31, 52-54. The terms in these statutes, therefore, were interpreted quite broadly and were read to allow for the civil commitment of virtually any type of dangerous conduct that substantially deviated from the normal standards of rational behavior. See G. GROB, THE STATE AND THE MENTALLY ILL 7 (1966) [hereinafter "STATE AND MENTALLY ILL"]; cf. BRAKEL, ET AL., *supra*, at 14 (stating that the New York "legislators considered the asylums to be primarily for the care of those violent persons who could not be cared for privately").

The lax diagnostic requirements for admission to the asylums were undoubtedly the byproduct of a lack of mental health knowledge and the then-dominant belief of the health profession that "insanity was an incurable affliction." See DEUTSCH, *supra*, at 132. The crucial point, though, is that the law broadly and consistently recognized, reflecting the then-limited understanding of psychiatry, that "insane asylums" were to be used not necessarily to treat the sick but to isolate the incorrigibly violent from the community.

2. *"Moral Insanity" as a Basis for Civil Commitment.* The early to mid-nineteenth century was marked by a fundamental change in attitudes and the intellectual climate regarding mental illness. To keep up with an increased number of people requiring civil commitment, States built new asylums. This, in turn, raised the visibility of civil commitment as a public issue, which resulted in new laws governing the commitment process.

The increased number of public facilities also spawned growth in the nascent profession. In 1844, the superintendents from thirteen asylums formed The Association of Medical Superintendents of American Institutions for the Insane, which ultimately became the American Psychiatric Association ("APA"). G. GROB, MENTAL INSTITUTIONS IN AMERICA: SOCIAL POLICY TO 1875 135, 137 (1973) [hereinafter "MENTAL INSTITUTIONS"]; BRAKEL, ET AL., *supra*, at 15 & n.35. The founding of the APA encouraged research into and debate about the diagnosis and treatment of mental disease. Old notions of insanity as the result of demonic possession gave way to a "somatic" interpretation that linked mental health with the physical condition of the brain,

especially the presence or absence of "lesions of the brain." See STATE AND MENTALLY ILL, *supra*, at 7-8, 51; I. RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 135-136 (1838) [hereinafter "MEDICAL JURISPRUDENCE"]; MENTAL INSTITUTIONS, *supra*, at 151-156.

This psychiatric theory was supported, in part, by the widespread acceptance of phrenology, which had taken root in the United States during the mid-nineteenth century. Phrenologists instructed that each function and propensity was located in a different region of the brain. "Each particular moral instinct had its own subchamber, in which it dwells in like seclusion, so that insanity on its part not only does not affect the mental properties, but is not necessarily communicated to its fellow instincts and affections." 1 F. WHARTON, WHARTON & STILLE'S MEDICAL JURISPRUDENCE § 567, at 551; see *Preface to id.* at vii-x, *id.* § 320, at 317-326 (3d ed. 1873) (discussing phrenology); see also MENTAL INSTITUTIONS, *supra*, at 152-153; R. Cooter, *Phrenology and British Alienists*, in MADHOUSES, MAD-DOCTORS, AND MADMEN 58-104 (1981).

"Moral insanity" was believed to be a disease separate and distinct from "intellectual insanity." By 1873, psychologists had identified numerous such manias, including "erotomania" or "aidoiomania" (morbid sexual - propensity),[2] pyromania, kleptomania, homicidal monomania, pseudonomania (morbid lying propensity), oikeiomania (morbid state of domestic affections), suicidal mania, dipsomania (morbid propensity for drink), fanatico-mania, religious insanity, and politico-mania. 1 WHARTON & STILLE, *supra*, §§ 578-679, at 561-671; see MEDICAL JURISPRUDENCE, *supra*, at 187-234. Those suffering from moral mania supposedly had an uncontrollable propensity to engage in the

[2] This mania is analogous to the type of mental abnormality or personality disorder defined by the SVP Act. 1 WHARTON & STILLE, *supra*, §§ 617-625, at 597-602 (citing various examples); see MEDICAL JURISPRUDENCE, *supra*, at 192-195 (defining "erotic mania" as an "affection, in a state of the most unbridled excitement, filling the mind with a crowd of voluptuous images, and ever hurrying its victim to acts of the grossest licentiousness, in the absence of any lesion of the intellectual powers").

particular type of conduct (and thus should not be held criminally responsible for that behavior), even though all other moral functions and intellectual capacity were normal. 1 WHARTON & STILLE, *supra*, § 567, at 551; see MEDICAL JURISPRUDENCE, *supra*, at 168-169; *id.* 187 (describing moral mania as prompting one "to action by a kind of instinctive irresistibility, and while he retains the most perfect consciousness of the impropriety and even enormity of his conduct, he deliberately and perserveringly pursues it").

Nevertheless, phrenologists thought that individuals could "deliberately and consciously cultivate different faculties by following the natural laws that governed physical development and human behavior." MENTAL INSTITUTIONS, *supra*, at 152. This belief, coupled with the somatic view of mental illness, encouraged psychiatrists to abandon their prior notion that mental disease was incurable, and a wave of optimism swept the profession. STATE AND MENTALLY ILL, *supra*, at 51-52; see DEUTSCH, *supra*, at 132-157. If moral insanity was caused by exposure to immoral or unhealthy environmental conditions, then it could be cured by moral treatment -- the immersion of the patient in a morally and environmentally healthy environment. See generally I. RAY, MENTAL HYGIENE (1863). Mental health specialists extolled the curative power of this so-called "moral treatment," and such methods were widely emulated in asylums in the United States throughout the mid-nineteenth century. See STATE AND MENTALLY ILL, *supra*, at 43-79.

These advances in the psychiatric profession were reflected in American law. Many courts adopted the psychiatrists' view that "moral insanity" could exculpate a person from criminal responsibility for his destructive behavior: acting out of an "irresistible impulse" rendered the actor "not guilty by reason of insanity," and thus the proper object of psychiatric confinement rather than criminal incarceration. In 1863, the Kentucky Supreme Court, for example, explained moral insanity and its legal effect as follows:

> "'[M]oral insanity arises from the existence of some of the natural propensities in such violence that it is impossible not to yield to them. * * *. Where its existence is fully established, this species of insanity relieves from accountability

to human laws.'" *Scott* v. *Commonwealth*, 61 Ky. (4 Met.) 227, 230 (1863) (quotation omitted).

See also *Commonwealth v. Mosler*, 4 Pa. 264, 267 (1846) (recognizing "a *moral* or *homicidal* insanity, consisting of an irresistible inclination to kill, or to commit some other particular offense"). Thirteen years later, in 1876, the Supreme Court of Connecticut relied on a finding of "moral mania" in *Andersen* v. *State*, 43 Conn. 514, 524 (1876), to reverse a capital sentence given to a convicted murderer. Three years later, the Alabama Supreme Court recognized moral insanity as a "species of mental disorder" although the court rejected its exculpatory value. *Boswell v. State*, 63 Ala. 307, 321 (1879). Both the Connecticut and Alabama courts recognized "moral insanity" as a form of mental illness, even though by 1873, some psychiatrists already were arguing against its acceptance as a viable psychiatric theory. Compare 1 WHARTON & STILLE, *supra*, §§ 552-566, at 528-551 (authorities repudiating doctrine) with *id.* §§ 542-551, at 516-528 (authorities maintaining doctrine).

3. *Sexually Violent Predation as a Ground for Civil Confinement.* As this survey demonstrates, from Colonial America through 1868 — when the Fourteenth Amendment was ratified — American legal principles authorized public authorities to confine persons who are today defined as SVPs under the Act. Until the first quarter of the nineteenth century, the perceived dangerousness of such a person, standing alone, would have been sufficient to warrant civil preventive detention. From that time forward, persons manifesting this kind of behavioral impulse could have been civilly committed as "morally insane" (a notion, however, that is now universally rejected by the psychiatric profession).

4. *Post-1868 Justifications for Civil Commitment.* Needless to say, there is no indication that the Congress or the States specifically intended to strip the States of this kind of custodial power when the Fourteenth Amendment was proposed and ratified. To the contrary, the consistent and widespread practice of the States after 1868 serves only to confirm that the Act is clearly within the State's power.

The States continued to maintain and use the general commitment statutes and rationales already discussed well into the

twentieth century, with the exception that psychiatrists and courts repudiated the existence and hence exculpatory value of moral mania. Note, *Moral Insanity*, 10 F. 189 (1882); see, *e.g.*, *Parsons* v. *State*, 2 So. 854 (Ala. 1887); *Kennedy* v. *Uniake*, 20 So. 749 (La. 1896); *Osborn* v. *Thomson*, 103 Misc. 23 (Sup. Ct. N.Y. 1918). In the 1930s, a burgeoning popular interest in turn-of-century studies of psychoanalysis and sexuality, many of which espoused the idea that "most types of sexual deviance should be dealt with by treatment, voluntarily or not," prompted many States to focus specifically on the problems caused by so-called "sexual psychopaths." GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30S TO THE 80S 851, 853 (1977) [hereinafter "GAP"]; R. Blacher, *Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 898-899 (1995). In 1937, Michigan became the first State to enact a "sexual psychopath law," which provided for the civil commitment and treatment of sexual psychopaths. The Michigan law "marked the beginning of a trend that peaked in the mid-1960s, by which time more than half the states had adopted" such laws. BRAKEL, ET AL., *supra*, at 739.

Some States repealed or modified these special commitment laws in the 1970s, many deciding, as a matter of legislative judgment, that voluntary treatment was more beneficial for the majority of sex offenders. *Id.* at 740. In 1984, however, sexual psychopath laws still existed in 16 States and the District of Columbia. *Ibid.* The trend toward repeal of such statutes recently reversed, as Kansas and at least seven other like-minded States[3] have enacted a new generation of sexual psychopath laws designed to address the problems caused by those who need custodial attention to avoid endangering themselves and others.

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[3] See ARIZ. REV. STAT. ANN. §§ 13-4601 to 13-4609 (1996); CAL. WELF. & INST. CODE §§ 6600-6608 (West 1996); FLA. STAT. ANN. §§ 775.21-775.23 (West 1995); IOWA CODE ANN. §§ 709C.1-709C.12 (West Supp. 1996); MINN. STAT. § 253B.02(7a) (Supp. 1995); WASH. REV. CODE ANN. §§ 71.09.010-71.09.902 (West 1992 & Supp. 1995); WIS. STAT. ANN. §§ 980.015-980.13 (West Supp. 1994).

Neither history nor current practice, therefore, supports the argument that the civil commitment of persons defined as SVPs under the Act violates any principle so rooted in the traditions and conscience of our people as to be ranked as fundamental. To the contrary, the SVP Act was carefully crafted in accordance with the constitutional guideposts that the Court has provided over the years.

II. THE KANSAS STATUTE IS CONSISTENT WITH THIS COURT'S CIVIL COMMITMENT JURISPRUDENCE.

A. The Act Invokes the Power to Confine Those Persons Who, Based on Contemporary Medical Knowledge, Pose a Serious Danger to Society and Who May Benefit From Professional Mental Health Treatment.

Kansas defines an SVP as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." KAN. STAT. ANN. § 59-29a02(a). A mental abnormality is defined, in turn, as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." *Id.* § 59-29a02(b).

Kansas already had a statute addressing involuntary commitment of those defined as "mentally ill" (see *id.* § 59-2901 to 59-2944), but the legislature found that this civil commitment program was inadequate to address the unique characteristics and needs of SVPs. In the preamble to the 1994 Act, the Kansas legislature explained:

> "The existing involuntary commitment procedure * * * is inadequate to address the risk these [SVPs] pose to society. The legislature further finds that the prognosis for rehabilitating [SVPs] in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities." *Id.* § 59-29a01.

The legislature found that SVPs "generally have antisocial personality features which are unamenable to existing mental illness

treatment modalities and those features render them likely to engage in sexually violent behavior." *Ibid.* The legislature also noted the "high" likelihood that SVPs would engage in repeat acts of predatory sexual violence. By contrast, the legislature pointed out, that the existing civil commitment procedure was "intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community." *Ibid.* Kansas, therefore, enacted the SVP Act to provide for commitment of only those individuals who are shown, beyond a reasonable doubt, to be both dangerous and in need of professional mental health treatment, albeit a treatment different from that accorded to those found to be "mentally ill" under Kansas' other involuntary commitment statute.

Kansas' decision to provide a separate civil commitment system for SVPs who, in the State's view, need professional mental health treatment involves a policy judgment which the State is authorized to make. As discussed above (see 6-7), the Court has long held that the Constitution allows the States to impose various restraints on personal liberty to protect public health and safety or to treat the person restrained. The Court also has expressly sustained the power of civil commitment of the mentally ill who pose a danger to themselves or others, *Addington* v. *Texas*, 441 U.S. 418 (1979), and of automatic commitment of persons acquitted of crime by reason of "insanity," *Jones* v. *United States*, 463 U.S. 354 (1983). See also *United States* v. *Salerno*, 481 U.S. 739 (1987) (upholding preventive pre-trial detention of certain dangerous indictees).

States' civil commitment authority stems from their police power to protect the public from dangers caused by sexually dangerous persons. *Addington*, 441 U.S. at 426. States also are responsible as *parens patriae* to help those, such as sexual psychopaths, who need help to help themselves. *Ibid*; see *Late Corp. of the Church of Jesus Christ of Latter-Day Saints* v. *United States*, 136 U.S. 1, 57 (1890); see also *In re James Barker*, 2 Johns. Ch. 232, 237 (N.Y. Ch. 1816) (describing evolution of *parens patriae* in English common law).[4] Both powers are

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[4] Civil commitment under these powers is recognized by the European Convention on Human Rights as well. G. Quinn, *Civil Commitment and*

implicated here. Respondent Leroy Hendricks admitted that he is a pedophile and, although he "hoped" that he would not have sexual contact with children after release, only by dying could he "guarantee" that he never would. See Resp. Conditional Cross Pet. at 8 (citing trial transcript). Kansas, under its police power, can protect society during the period when Hendricks cannot control himself from harming others. Kansas, pursuant to its responsibility as *parens patriae*, can provide Hendricks with professional mental health treatment so that he can learn to help himself.[5]

B. The Kansas Legislature Had the Power, Based on Current Medical Knowledge, to Conclude That Sexually Violent Predators are Dangerous and Suffer From a Condition That Could Benefit From Professional Mental Health Treatment.

1. *The Court Has Recognized the Ability of Professionals to Predict Future Dangerous Conduct.* The first critical element under the Act is the State's obligation to prove beyond a reasonable doubt that the alleged predator is likely to engage in the prohibited conduct. There is a split within the psychiatric community regarding the extent to which future dangerousness can be predicted. The Kansas legislature, aware of this disagreement of authority, chose to rely on the judgment of those professionals who believe that such conduct can be adequately ascertained. This is the type of policy judgment that is most worthy of judicial deference. In addition, limiting the ability of the States to use new, potentially beneficial treatment modalities until there is universal professional acceptance of their efficacy would hamstring the States' ability to address pressing social problems that endanger society.

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the Right to Treatment Under the European Convention on Human Rights, 5 HARV. HUM. RTS. J. 1, 7 (1992).

[5] The inability of psychopaths to control themselves from engaging in behavior for which they subsequently feel remorse is highlighted by the widely reported plight of Larry Don McQuay, a convicted child molester, who is "begging the state of Texas to castrate him" to help him resist his urge to prey on children. William Raspberry, *Castration Anxiety*, WASH. POST, Apr. 12, 1996, at A25.

The Court already has recognized that, in light of medical advances and other evidentiary factors, the law may impose very substantial burdens on personal liberty based on a prediction that the person will engage in dangerous behavior in the future. *Schall* v. *Martin*, 467 U.S. 253, 278 (1984) (noting that predictions of future criminal conduct form "an important element in many decisions, and we have specifically rejected the contention * * * 'that it is impossible to predict future behavior and that the question is so vague as to be meaningless'"); see *Salerno*, 481 U.S. at 751 (quoting *Schall*). An assessment of future dangerousness, for example, is one factor used to determine whether a defendant should receive the death penalty for conviction of a capital crime. *Barefoot* v. *Estelle*, 463 U.S. 880, 896-903 (1983) (considering and rejecting argument "that psychiatrists, individually and as a group, are incompetent to predict with an acceptable degree of reliability that a particular criminal will commit other crimes in the future and so represent a danger to the community").

Congress itself recently acted on the basis of a similar determination that, with predatory sexual conduct of this sort, prior conduct is predictive of future behavior. In 1994, Congress directly amended the Federal Rules of Evidence to specify that, in any civil or criminal case in which a defendant is accused of child molestation, evidence that defendant previously committed an offense of child molestation will be admissible. Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135-2137 (1994), adding Rules 414 and 415. These legislatively formulated declarations of public policy supersede, in sex offense cases, the restrictive aspects of Rule 404(b). Thus, they illustrate the widespread professional consensus that prior incidents of child molestation are legitimately probative to show a defendant's propensity to commit additional acts of the same nature.

Most important, however, is the fact that this Court has previously considered, and rejected, the argument that predictions of future dangerousness are insufficiently reliable to base a decision regarding future civil commitment. *Foucha* v. *Louisiana*, 504 U.S. 71, 76 n.3 (1992) (noting that psychiatric opinion "is reliable enough to permit the courts to base civil commitments on clear and convincing medical evidence that a person is mentally ill and dangerous"). This is particularly true where, as with Hendricks,

there previously has been a judicial determination of criminal conduct. As Justice O'Connor has noted, such a conviction provides "'concrete evidence'" of the individual's dangerousness. *Foucha*, 504 U.S. at 87 (O'Connor, J., concurring) (quoting *Jones*, 463 U.S. at 364). And given the uncertainty of the present state of knowledge and therapy regarding mental disease, "'courts should pay particular deference to reasonable legislative judgments' about the relationship between dangerous behavior and mental illness." *Ibid.* (quoting *Jones*, 463 U.S. at 365 n.13).

C. The Act is Constitutional Because the Nature and Duration of the Civil Commitment Are Reasonably Related to Legitimate State Interests.

Assuming a "substantive" component to the due process clause, "[d]ue process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed." *Foucha*, 504 U.S. at 79. "Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. Equally important, confinement must cease when those reasons no longer exist." *O'Connor* v. *Donaldson*, 422 U.S. 563, 580 (1975) (Burger, C.J., concurring).

In *Foucha*, the Court held that the Due Process Clause of the Fourteen Amendment prevents a State from continuing to confine in a mental institution a person acquitted of a crime who has subsequently recovered his sanity, but is otherwise dangerous as a result of a different, but nonadjudicated personality disorder. Justice O'Connor's concurring opinion was crucial to the decision. She reasoned that the vice of the Louisiana statute was the potentially indefinite confinement in a mental hospital without any showing that the inmate belonged in that type of facility. Her opinion, however, explicitly suggested that she would sustain even some continued detention of an insanity acquitee who had recovered his sanity, if "the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquitee's continuing dangerousness." 504 U.S. at 87-88. The Act satisfies the *Foucha* formulation.

Kansas expressed two purposes justifying the legislation. First, Kansas sought to protect its citizens from the dangers posed

by sexual predators who, the legislature found, have a "high" likelihood of engaging in repeat acts of sexual violence if released. Although sexual predators comprise an extremely small number in our society, they present a danger disproportionate to their number. Many prey on children, the most innocent and vulnerable in the community, and there is mounting evidence that SVPs commit an unusually high number of crimes. Testimony of Carla J. Stovall, Parole Officer, before the State of Kansas Senate Judiciary Committee 1 (Feb. 22, 1994) (National Institute of Mental Health-funded study of 453 pedophiles reports that each had abused an average of 52 girls or 150 boys.); M.C. Henderson & S.C. Kalichman, *Sexually Deviant Behavior and Schizotypy: A Theoretical Perspective With Supportive Data*, 61 PSYCHIATRIC Q. 273, 273 (1990) (citing study in which self-reported child molesters had an average 72 victims each).

Second, Kansas sought to offer a form of mental health treatment different from that provided to persons adjudged "mentally ill" under its pre-existing civil commitment statute. This was needed, the legislature explained, because "[t]he treatment needs of [the sexual predators] are very long term," "the treatment modalities for this population are very different than the traditional treatment modalities," and they "generally have antisocial personality features which are unamenable to existing mental illness treatment modalities." KAN. STAT. ANN. § 59-29a01.

Civil commitment under the Act is reasonably related to achieving both goals. As for protecting the public, the statute carefully limits its application to only those persons who are shown beyond a reasonable doubt to have been convicted of or charged with one of the specifically defined sexually violent offenses and to suffer from a mental abnormality or personality disorder that makes that person, unless confined, likely to engage in predatory acts of sexual violence in the future. KAN. STAT. ANN. §§ 59-29a02, 59-29a07. These provisions ensure that the Act affects only a "small but extremely dangerous group." *Id.* § 59-29a01. Thus, this is a "sharply focused scheme" of the sort carefully distinguished in *Foucha*. 504 U.S. at 81.

By design, the Act is drafted so that the vast "majority of [sex] offenders would not need to be committed under this statute." Letter from Tom Locke, Ph.D, Kansas Psychological Ass'n to

Senator Marge Petty 2 (Feb. 3, 1994). According to Kansas State Senator Bob Vancrum, at the time of the statute's adoption, it was estimated that only 33 persons would be committed as SVPs under the Act. See Testimony from Senator Bob Vancrum to the State of Kansas Senate Judiciary Committee 2 (Feb. 22, 1994). Far from targeting all sex offenders, therefore, Kansas merely seeks to institutionalize those few, most dangerous sex offenders for treatment and for the protection of society.

The Act's reach is limited by requiring that the elements necessary for commitment are established by proof beyond a reasonable doubt (KAN. STAT. ANN. §§ 59-29a02, 59-29a07), that the mental condition of each person committed is examined annually (*id.* § 59-29a08), and that those committed may file a petition for discharge at any time (*id.* § 59-29a11). Once the person's mental abnormality or personality disorder has changed so that he is safe to be at large, he must be released. *Id.* § 59-29a07. Numerous procedural safeguards thus ensure a fair hearing and competent factfinding to support any commitment decisions.

The fact that modern medical evidence supports the conclusion that sexual predators can benefit from professional mental health treatment is another fundamental distinction between this case and *Foucha*, 504 U.S. at 82.[6] In *Foucha*, unlike here, there was "no effective treatment" for the patient's personality disorder; hence there was no reasonable relationship between Foucha's continued civil confinement in a mental hospital and the purposes for *that* kind of detention.[7]

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[6] Even if the prevailing medical wisdom were that there is little likelihood of success in treating SVPs — which it is not — the Act still would pass constitutional muster, because due process does not demand some arbitrary level of probability of cure. *Jackson* v. *Indiana*, 406 U.S. 715, 725 (1972) (noting that civil commitment is not constitutionally barred for persons for whom prognosis was "'rather dim'"); see *Greenwood* v. *United States*, 350 U.S. 366, 375 (1956) ("The fact that at present there may be little likelihood of recovery does not defeat federal power to make this initial commitment of the petitioner.").

[7] Any argument that Kansas is not providing pertinent mental-health treatment is expressly refuted by the record. See J.A. 387, 453-54.

Neither is the Act unconstitutional because it results, in certain circumstances, in civil commitment after criminal incarceration. *Baxstrom* v. *Herold*, 383 U.S. 107, 110 (1966). Kansas unquestionably has the authority to impose life imprisonment upon those convicted of sexually violent crimes. The Constitution does not bar Kansas from eschewing harsher prison sentences for sex offenders in favor of lighter prison sentences followed by civil commitment and state-sponsored mental health treatment.

Indeed, Kansas' criminal/civil choice is quite reasonable and humane in light of current medical knowledge and well-established notions of criminal culpability. On the one hand, sexual predators can recognize the difference between right and wrong, and thus are susceptible to deterrence and worthy of the societal condemnation accompanying criminal conviction. On the other hand, because of SVPs' mental abnormalities or personality disorders, they may be less able than others to control their dangerous impulses and thus proper candidates for state-imposed custodial treatment. In a very real sense, then, SVPs are both "bad" and "mad". See K.P. Blakey, *The Indefinite Civil Commitment of Dangerous Sex Offenders Is An Appropriate Legal Compromise Between "Mad" and "Bad" — A Study of Minnesota's Sexual Psychopathic Personality Statute*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227 (1996).

In the nineteenth century, the law attempted to reconcile sexual psychopaths' bad/mad characteristics by developing the now-discredited concept of criminal exculpation based on moral mania. In the mid-twentieth century, States responded with sexual psychopathy laws. Kansas' criminal/civil scheme is merely the latest of these efforts designed to reconcile the fact that SVPs' characteristics make them imperfect candidates for either the traditional criminal or civil system. Kansas' response to this dilemma, the adoption of a criminal/civil approach, falls squarely within its authority to choose from among rational methods by which to protect society and to ensure that its citizens are treated

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Even if Kansas was not fulfilling its undertaking, the appropriate response would be to require compliance with the Act, not a finding that the Act itself is unconstitutional.

consistent with their culpability as determined by contemporary psychiatric knowledge and societal mores. As the Court previously has recognized, "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington*, 441 U.S. at 431.

D. There is No Constitutional Significance to the Phrase "Mental Illness."

In striking down the Act, the Kansas Court misread this Court's precedents to require a finding of "mental illness" as a constitutional minimum for all civil commitment statutes. The Kansas Court found that "neither the language of the Act nor the State's evidence supports a finding that 'mental abnormality or personality disorder,' as used in 59-29a02(a), is a 'mental illness' as defined in 59-2902(h)." *In re Hendricks*, 912 P.2d 129, 138 (Kan. 1996), cert. granted, 116 S. Ct. 2522 (1996). "Absent such a finding," the court continued, "the Act does not satisfy the constitutional standard set out in *Addington* and *Foucha*." *Ibid.* According to the Kansas court, *Foucha* "stated that to indefinitely confine as dangerous one who has a personality disorder or antisocial personality but is not mentally ill is constitutionally impermissible. Similarly, to indefinitely confine as dangerous one who has a mental abnormality is constitutionally impermissible." *Ibid.*

The Due Process Clause of the Fourteenth Amendment draws no such distinction, however, and the Court has never held that a State may civilly commit only persons who have been adjudged, beyond a reasonable doubt, to be both dangerous and suffering from a treatable "mental illness" as technically defined. Compare *Foucha*, 504 U.S. at 78-80 (commitment unconstitutional where patient is *neither* mentally ill or diseased *nor* dangerous) with *Allen*, 478 U.S. at 366 (commitment constitutional where patient suffered from mental disorder, had propensities to commit sex offenses, and had demonstrated such propensities). See also *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270, 270-271 (1940) (upholding statute providing for civil commitment of those with "psychopathic personality," interpreted as "those persons who, by habitual course in misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or

other evil on the objects of their uncontrolled and uncontrollable desire"); *Jackson* 406 U.S. at 728 n.6 (commenting that civil commitment of "feeble-mindedness" not problematic).

Rather, the issue is whether the condition — however defined — that poses the danger has abated. Thus, for example, Justice O'Connor in *Foucha* referred in more general terms to the State's authority to confine "mental patients" when there is "some medical justification for doing so," without specifying the need for some technical diagnosis of "mental illness" (rather than some other condition that comes within the ambit of mental-health treatment). 504 U.S. at 88. Indeed, to hold otherwise would create an inconsistency with the laws governing civil restraints of liberty rights in analogous circumstances not involving any species of "mental illness" or "insanity," including forcible quarantines of persons suffering from dangerous but purely physical conditions. See 5-6.

Moreover, requiring a finding of "mental illness" as a constitutional minimum for all civil commitment statutes would be tantamount to delegating to the psychiatric profession the ultimate determination of whether any State's civil commitment law comports with the Constitution. Psychiatrists themselves concede that they know of no definition that adequately specifies the precise boundaries of the concept of mental illness. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxi (4th ed. 1994) [hereinafter "DSM-IV"] see *Ake* v. *Oklahoma*, 470 U.S. 68, 81 (1985) ("noting that psychiatrists disagree widely and frequently on what constitutes mental illness"). And the profession expressly disavows any nexus between its diagnostic categories of mental disorders and legal concepts bearing similar monikers. *Id.* at xxvii ("Cautionary Statement" warning that inclusion among diagnostic categories in the DSM-IV "does not imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder, or mental disability"). This is, in part, because of the "imperfect fit" between the questions of ultimate concern to the law and those of the profession and the realization that legal judgments also "take into account such issues as individual responsibility * * * and competency." *Id.* at xxiii, xxvii; see also A. M. Dershowitz, *The Psychiatrist's Power in Civil Commitment: A Knife that Cuts*

Both Ways, 2 PSYCHOL. TODAY 43 (1969) (arguing that defining imposition of civil commitment in medical, as opposed to legal, terms leads to irrational results).

The "imperfect fit" between law and psychiatry also is caused by the fact that nonmedical factors have, historically, influenced which conditions psychiatrists have chosen to characterize as "mental illnesses." See, *e.g.*, D.B. WEXLER, MENTAL HEALTH LAW: MAJOR ISSUES 16 (1981) (noting that in 1851, some psychiatrists labeled slaves in South who refused to work as suffering from "dysaesthesia Aethiopis" and those who fled their masters as suffering from "drapetomania"). This phenomena is not unique to psychiatry; Dr. Oliver Wendell Holmes observed that "'medicine, professedly founded on observation, is as sensitive to outside influence, political, religious, philosophical, imaginative, as is the barometer to the changes of atmospheric density.'" MENTAL INSTITUTIONS, *supra*, at 3 (quoting O.W. HOLMES, MEDICAL ESSAYS 1842-1882 177 (1891). The Court too has noted that nonmedical considerations, such as "social and legal aspects," "are implicit in the definition of mental illness itself." *Humphrey* v. *Cady*, 405 U.S. 504, 509 n.4 (1972).

Neither would be it prudent to stake the constitutionality of a State's civil commitment statute on whether that law expressly limited commitment only to the "mentally ill," even if the definition of the phrase were left to the State. Such a rule would elevate to talismanic significance the phrase "mental illness" — in direct contravention of Court's prudent position that labels or other "magic words" should not be raised to constitutional significance. See *Foucha*, 504 U.S. at 118 n.13 (Thomas, J., dissenting), citing *Railway Express Agency, Inc.* v. *Virginia*, 358 U.S. 434, 441 (1959) (constitutionality of state action should not turn on "magic words"). Moreover, it would unnecessarily limit the States' ability to pursue novel civil commitment policies — even though contemporary medical knowledge may indicate that some patient requirements, like those of the SVPs here, are incompatible with an extant system designed for the "mentally ill."[8]

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[8] Kansas' current scheme provides a useful example. The Act defines "SVPs" and the "mentally ill" in a mutually exclusive manner. Compare

In the analogous context of criminal insanity, Justice Kennedy has commented:

> "'Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. . . . It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.'"

Foucha, 504 U.S. at 96 (Kennedy, J. dissenting) (quoting *Powell* v. *Texas*, 392 U.S. 514, 536-537 (1968) (Marshall, J., plurality opinion) and citing *id.* at 545 (Black, J., concurring)). This reluctance to constitutionalize the criminal insanity test applies equally here, especially in light of the Alice-in-Wonderland-like quality of the term "mental illness," a phrase which, as demonstrated above, is capable of many meanings depending on who is its "master."[9]

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§ 59-29a02 (SVP) with § 59-2902(h) (mentally ill). By so doing, Kansas is able to provide SVPs with some procedural protections greater than those afforded the "mentally ill" (compare, *e.g.*, § 59-29a07 ("beyond a reasonable doubt" standard for commitment of SVP) with, *e.g.*, § 59-2917(f) ("clear and convincing" standard for mentally ill)), without running afoul of the Court's equal protection jurisprudence. See *Humphrey*, 405 U.S. at 512 (noting equal protection problems presented by possibility of confinement of an individual under either of two civil commitment statutes, when statutes afford different procedural protections); see also *Jackson*, 406 U.S. at 729-730; *Baxstrom*, 383 U.S. at 110.

[9] "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean — neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master — that's all."

L. CARROLL, THROUGH THE LOOKING GLASS 124 (Macmillan ed. 1928).

E. There Are Medically Recognized Treatments For SVPs.

Contemporary knowledge within the psychiatric field supports Kansas' determination that SVPs could benefit from state-sponsored mental health treatment. Although the psychiatric profession now recognizes numerous promising treatments for SVPs, that has not always been the case. Until the late seventies and early eighties it was generally accepted that a SVP's sexual deviance was the result of an "out of control" sexual drive, that could not be abated by then-known methods of psychiatric treatment. B.K. Schwartz, *Effective Treatment for Sex Offenders*, 22 PSYCHIATRIC ANNALS 315 (1992). In the late seventies, however, the profession began to discover that sexual deviants were not just people with zealous sex drives, but rather suffer from a host of interrelated problems that combine to create an environment compelling them to act out their fantasies.

Viewing the SVP as a mix of psychological and emotional ills encouraged the psychiatric community to try to develop treatments for SVPs:

> "Traditionally, the major emphasis and concern of counselors have been on the psychological and emotional well-being of the victim. It is difficult to dispute the inherent logic in this position; yet logic also dictates that offenders should receive therapeutic attention if the incidence of * * * sexual victimization is to be reduced." Priest, et al., *Counseling Adult Sex Offenders: Unique Challenges and Treatment Paradigms*, 71 J. OF COUNSELING & DEVEL. 27 (1992) (citations omitted).

By the early eighties, the psychiatric community had accepted the notion that "sex crimes are rarely sexually motivated." I.C. Wiederholt, *The Psychodynamics of Sex Offenses and Implications for Treatment*, 18 J. OF OFFENDER REHABILITATION 20 (1992). A significant breakthrough came with Dr. A.N. Groth's classification of two general types of SVPs, the "fixated offender" and the "regressed offender." Priest, et al. *supra*, at 28. He identified the fixated offender, whose attraction often focuses on children, as suffering from an arrest of psychological maturation. Meanwhile, the regressed offender, whose maturation process may be quite

normal, suffers from a temporary compulsion toward immature behavior brought on by stress or trauma. Not surprisingly, the psychotherapeutic treatments that each one requires are vastly dissimilar.

Dr. Groth's advances in the understanding of the mental dynamics of sexual deviance and his classification of those dynamics into two categories did not, alone, solve the riddle of how to treat SVPs. Although categorization of conduct is helpful, need for individual treatment is critical to address the unique nature of each SVP. See Pfafflin & Friedemann, *What is in a Symptom? A Conservative Approach in the Therapy of Sex Offenders*, 18 J. OF OFFENDER REHABILITATION 16 (1992). Thus this group of offenders (SVPs) is not a homogenous group of sexual deviants, but rather a varied group of stories, as myriad as the number of people inflicted with the debilitation.

It was once argued that penal sanctions produced a type of "shock therapy," as it confronted the SVP with the consequence of his acts. *Id.* at 5. But penal sanctions, though a reasonable and fair penalty for sexually violent acts, treat SVPs as one group with little distinction. Modern psychiatric knowledge recognizes that each SVP has a unique psychic make-up, which includes various "dynamics of physical arousal and distorted emotional needs." Schwartz, *supra*, at 318. To address the range of SVPs' emotional deficiencies, psychiatrists have developed specialized treatments specifically tailored to meet the requirements of the individual offenders. Psychiatric treatment, whether with psychotherapy or pharmacotherapy, now provides an individualized program of mental rehabilitation for sexual psychopaths.

Contemporary psychiatric approaches target the SVP's unresolved psychological and emotional issues. Currently accepted methods for treating SVPs include: addressing directly the SVP's deviant sexual fantasies, teaching SVPs methods of self-control, exploring the SVP's own possible sexual abuse and recognizing and treating victimization,[10] addressing cognitive distortion, treating

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[10] "A theme common to many dangerous sex offenders is a history of abuse and neglect during their formative years, including sexploitation." L.A. French & J.J. Vollman, Jr., *Treating the Dangerous Sex Offenders:*

personality traits and personality disorders, helping the SVP develop a plan to interrupt unhealthy patterns and habits that may lead to sexual deviance, and overcoming denial of sexual problems and helping a SVP take responsibility for his acts. Schwartz, *supra*, at 317. The psychotherapy component of medical treatment for sexual deviance is carried out in many ways, including group therapy, role-playing/role-reversal therapy, covert sensitization (acquiring reactions of repulsion to deviant fantasies and impulses), and cognitive restructuring (confronting denial). Priest, et al. *supra*, at 30-31. By 1992, there were more than over 1,200 programs in the United States for treating SVPs . Schwartz, *supra*, at 318.

There also have been significant advances in the use of drugs for treatment of sexual deviance. Cyproterone acetate, for example, has proven effective in controlling deviant sexual fantasies. V.L. Quinsey & C.M. Earl, *The Modifiable Sexual Preference*, in HANDBOOK OF SEXUAL ASSAULTS: ISSUES, THEORIES AND TREATMENT OF THE OFFENDER 279-295 (W.L. Marshall, et al. eds. 1990). Psychotropic drugs have been found to achieve a modicum of effectiveness, to the extent that a SVP's sexual deviance can be identified as part of an obsessive-compulsive disorder. E. Coleman, et al., *An Exploratory Study of the Role of Psychotropic Medications in the Treatment of Sex Offenders*, 18 J. OF OFFENDER REHABILITATION 76 (1992). It was these advances in psychotherapy and pharmacotherapy that prompted the Kansas Psychological Association to report that most sexually violent offenders respond positively to treatment and can be taught "the skills to control their impulses." Letter to Senator Marge Petty from Tom Locke, Ph. D, Kansas Psychological Association 1-2 (Feb. 3, 1994).

As the above makes clear, modern psychiatry offers a host of beneficial treatments for SVPs. See also W.L. Marshall, et al., *Treatment Outcome with Sex Offenders*, 2 CLINICAL PSYCHOL.

A Clinical/Legal Dilemma, 31 INT'L J. OF OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 62 (1987). Psychotherapy addresses underlying issues like past child abuse in the SVP's youth in order to enable him to break his current cycle of abuse.

REV. 465 (1991) (discussing numerous modern treatment programs); P. Gendreau & R.R. Ross, *Revivification of Rehabilitation: Evidence From the 1980s*, 4 JUST. Q. 349, 381-384 (1987); Henderson & Kalichman, *supra*, at 273-282 (same). Even so, psychiatric knowledge of treatment of sexual deviance is still evolving, and all of the dynamics of sexual psychopathology still are not known. Based on what psychiatrists now know, however, it was well within the Kansas legislature's power to decide that there are effective psychiatric treatments for SVPs available to justify requiring civil commitment for their own benefit as well as society's safety. In rejecting a constitutional challenge to Massachusetts' decision to try to control an analogous dangerous condition then threatening its citizens, this Court explained:

> "It is no part of the function of a court or a jury to determine which one of two modes [of treatment] was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety." *Jacobson*, 197 U.S. at 30 (compelling vaccination for smallpox, even though the medical community was divided as to whether vaccination would stem or exacerbate the epidemic).

As the Court recognized then, nothing in the Due Process Clause of the Fourteenth Amendment denies States the power to make such policy choices.

CONCLUSION

The judgment of the Supreme Court of Kansas should be reversed.

Respectfully submitted.

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October Term, 1995

STATE OF KANSAS,

Petitioner,

vs.

LEROY HENDRICKS,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR THE NATIONAL MENTAL HEALTH ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF FOR THE NATIONAL MENTAL HEALTH ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

National Mental Health Association ("NMHA") is the national citizens' voluntary advocacy organization working with and on behalf of people with mental illness. With 600 affiliates in 43 states and the District of

Columbia, NMHA has worked toward eliminating discrimination against people with mental illness since 1909. The alleviation of stigma and public misconceptions about mental illnesses and the people who have them is a continuing emphasis of NMHA and its affiliates. Part of NMHA's mission is to advocate for sufficient resources for people with mental health treatment needs across the United States. The outcome of the case before the Court will have a substantial impact on NMHA, its affiliates and the community members which they serve.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus is familiar with, and supports, the arguments of *amicus* American Civil Liberties Union that the Kansas Sexually Violent Predator Act is constitutionally infirm on substantive due process grounds. The Kansas statute is a misguided attempt to "medicalize" the behavior of people who commit sexually violent offenses, and thereby blurs the distinction between incarceration for violent criminal behavior and civil commitment upon a showing of mental illness, to the serious detriment of people with mental illness.

Amicus does not dispute that sexually violent predators should be subjected, for the safety of society, to some form of social control. Kansas has a legitimate interest in confining "sexually violent predators," but it must do so in a manner that comports with the Constitution and this Court's precedents. Civil commitment must be reserved for those who are mentally ill, *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992), including offenders who have bona fide mental disorders and who are dangerous

to self or others. It is not appropriate for violent sex offenders who have no recognized mental illness.

The Kansas Legislature passed the Act in an attempt to remedy the effects, beginning in the late 1970s, of lenient sentencing practices for sexually violent offenders. Now finding itself faced with the release from prison of offenders who are still considered dangerous, the Legislature attempted to create a new system of social control to continue these offenders' confinement. The problem Kansas sought to address by passing the Sexually Violent Predator Act can be solved prospectively by the imposition of longer prison sentences for sexual offenders.

Leading researchers have concluded that sexually violent criminal behavior is relatively intractable, and there is little evidence that treatment effectively reduces recidivism. Moreover, mental health facilities are largely unequipped to handle the treatment needs of violent sexual predators, and lack the experience necessary to deal with such a population. Further, without assurances that sexually violent predators will be segregated in state mental health facilities, there exists a real risk that they will continue their predatory behavior against the general population of persons with serious mental illness.

The inevitable result of committing sexually violent predators to mental health facilities will be a significant diversion of resources away from the care of people with treatable mental illness. Because of the absence of effective treatments, violent sex offenders will be warehoused in state mental hospitals, consuming scarce

resources, and displacing the service needs of large numbers of law-abiding people with treatable mental illness.

Furthermore, committing sexually violent predators to mental health facilities adds to the stigma surrounding mental illness because it promotes the idea that hospitals are not places for recovery, and further inflames a public that believes that people with mental illness are prone to violence.

ARGUMENT

I. SUBSTANTIVE DUE PROCESS REQUIRES A SHOWING OF MENTAL ILLNESS AND DANGEROUSNESS BEFORE A PERSON CAN BE SUBJECT TO INVOLUNTARY CIVIL COMMITMENT

While recognizing that society has legitimate reasons to curtail the liberty of violent persons, this Court has maintained a bright line between incarceration for criminal behavior and commitment on the basis of mental illness and dangerousness. In each context, it has insisted on scrupulous adherence to due process in order to protect the rights secured to individuals by the Fifth and Fourteenth Amendments.

Due process in the criminal law context has required both procedural and substantive safeguards, including the right to jury trial, the privilege against self-incrimination and the requirement for conviction based on evidence beyond a reasonable doubt.

In considering civil commitment of individuals with mental illness, this Court has required that confinement may only be imposed where a person is both mentally ill *and* presently dangerous. *Addington v. Texas*, 441 U.S. 418 (1979); *Jones v. United States*, 463 U.S. 354, 363 (1983). As recently as 1992, in *Foucha v. Louisiana*, 504 U.S. 71 (1992), the Court emphasized that both the mental illness and the dangerousness prongs must be satisfied for a civil commitment to comport with the Due Process Clause. In *Foucha*, the Court struck down a state law providing for

the indefinite confinement of an insanity acquittee who was no longer mentally ill, on the basis of his potentially being dangerous due to his antisocial personality. In *Foucha*, Justice White wrote that antisocial personality alone could not justify commitment:

> This rationale would permit the state to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. *The same would be true of any convicted criminal, even though he had completed his prison term.* It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.

504 U.S. at 82-83 (emphasis supplied). *See also In re Personal Restraint of Young*, 122 Wash.2d 1, 60, 857 P.2d 989, 1018 (1993) (Johnson, J., dissenting) ("[B]y authorizing the indefinite confinement in mental facilities of persons who are not mentally ill, [Washington's Community Protection Act] threatens not only the liberty of certain sex offenders, but the liberty of us all").

While Kansas clearly faces a public safety dilemma when the prison terms of sexually violent offenders expire, it may not constitutionally resolve that dilemma by blurring the line between incarceration and civil

commitment.[1] Yet that is precisely what the Kansas statute purports to do. It civilly commits sexually violent predators without any evidence that their criminal behavior is caused by mental illness.

The term "mental illness" is reserved for psychological conditions that impair virtually every aspect of the lives of people it affects. It does not apply to those who merely cannot resist deviant sexual urges whose origin, in any case, is unrelated to mental illness.[2] Criminal behav

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[1] The criminal justice system is the more appropriate system for handling sex offenders, and the Supreme Court has given states wide latitude to impose long prison sentences for violent sexual offenses. As Justice Lockett said in his concurring opinion: "Without violating the Constitution, the State could have incarcerated Hendricks until he exhaled his last breath and his spirit departed this earth, but it did not." *In re Care and Treatment of Hendricks*, 912 P.2d 129, 139 (Kan. 1996) (Lockett, J., concurring).

[2] *See, e.g.*, Robert F. Schopp & Barbara J. Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 BEHAV. SCI. & L. 437, 451-452 (1995) ("Neither sexual assault nor the paraphilias...entail psychological aberration apart from the desire to perform such conduct and the willingness to act on that desire....Insofar as mental illness means a pattern of impaired psychological capacities, [sexually violent predators] as a group demonstrate none."); Winick, Bruce J., *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 Psychol. Pub. Pol'y & L. 534, 572-573 (1995)("...many of the 'personality disorders' do not seem to be 'illnesses' in an organic sense (although they do reflect maladaptive behavior patterns). The 'impulse control disorders'...or the sexual disorders known as paraphilias...also do not seem to be illnesses in this sense. Unless the individual has a multiple diagnosis, these problems are not though to be organic in nature and do not respond to organic treatment methods of the kind for which hospitalization is medically justified."); Comment, *The Importance of Being Insane: Sexual Predator Civil*

ior, including sexually violent behavior, is more often the product of a failure of moral development, or insufficient impulse control, than it is a result of mental illness. *See* LEON RAPPOPORT, PERSONALITY DEVELOPMENT: THE CHRONOLOGY OF EXPERIENCE 174-175, 244 (1972).

That "sexually violent predators," as defined in the Sexually Violent Predator Act, do not suffer from mental illness is borne out by the language and legislative history of the statute, as well as by research. The Kansas Legislature justified enactment of the statute on the basis that sexually violent predators "do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons," Kansas Statutes Annotated (hereinafter, "K.S.A.") § 59-29a01.

In defense of its law, Kansas asserts that it has broad discretion to define "mental illness" for constitutional purposes,[3] Brief of Petitioner at 39, and that the use of

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Commitment Laws and the Idea of Sex Crimes as Insane Act, 32 HOUS. L. Rev. 775, 804 (1995) (rape and other sexually violent criminal behavior is caused by "any distinct, consistent mental pathology. In other words, the psychological factors that lead to rape are not very different from the psychological factors that lead to other serious crimes that are not generally thought to be caused by mental illness.").

[3] While this Court has given states wide latitude to define mental illness, and to prescribe systems for involuntary civil commitment, no such deference is owed to the Kansas statute because it involves no "medical or scientific uncertainties," *Marshall v. United States*, 414 U.S. 417, 427 (1974).

"mental abnormality" does not work a substantive change to the civil commitment scheme endorsed by this Court. In fact, however, the Kansas statute strikes at the very heart of that system by failing to require a finding of mental illness to support commitment. The discretion afforded to the state can revive a statutory scheme that ignores such a basic due process requirement. If Kansas were correct in asserting that the Act imposes no substantive change in the definition of a mental illness, there would have been no need to enact it. The director of corrections could simply have instituted civil commitment proceedings against all those who were a danger to others as a result of a diagnosed mental illness.

Instead, because the Kansas Legislature recognized that the civil commitment system was not appropriate for sexually violent predators, it had to create a legal fiction of "mental abnormality" in the hope that the Act would pass constitutional muster. The Legislature specifically found that sexually violent predators are not mentally ill[4],

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[4] The legislative findings are as follows:

> The legislature finds that a small but extremely dangerous group of sexually violent predators exist *who do not have a mental disease or defect* that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 *et seq.* and amendments thereto, which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under K.S.A. 59-2901 *et seq.* and amendments thereto, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment

and it is precisely because of that fact that the State had to create this new and illegitimate system. The definition of a "mental abnormality" leaves no doubt that it is intended to apply to a group that has not been considered, and is not, mentally ill.

Reviewing the statute and legislative history, the Kansas Supreme Court held that the statute does not require a finding of mental illness: "If there is nothing to treat under [the civil commitment for mental illness statute], then there is no mental illness....By such language, the legislature recognizes that sexually violent predators are not mentally ill but, rather, have an 'antisocial personality feature' or a 'mental abnormality.'" *In re Care and Treatment of Hendricks*, 912 P.2d 129, 136-137 (Kan.

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modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 *et seq.* and amendments thereto is inadequate to address the risk that sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different [from] the traditional treatment modalities for people appropriate for commitment under the treatment act for mentally ill persons defined in K.S.A. 59-2901 *et seq* and amendments thereto, therefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature. (K.S.A. § 59-29a01)(emphasis supplied).

1996). The Kansas Supreme Court thus held that "[a]bsent such a finding [that the term "mental abnormality or personality disorder is a mental illness as defined by state law], the Act does not satisfy the constitutional standard set out in Addington and Foucha." *Id.* at 138.

The term "mental abnormality"[5] takes in a very broad range of behavior, including poor impulse control. "'Mental abnormality' is much broader than any conceivable contemporary psychiatric diagnosis of mental disorder or mental illness." Robert M. Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predator Statute*, 15 U. PUGET SOUND L. REV. 597, 602 (1992). Neither personality disorder nor antisocial personality disorders are particular to sex offenders, and therefore almost any person convicted of sex crimes could be said to have such a disorder. The result is a criterion which can be stretched to fit all sex offenders, whether mentally ill or not. Similarly, "personality disorder," by itself, is not enough to support the label of "mentally ill" for purposes of civil commitment.

The federal courts have recognized what the Kansas Legislature concedes in the Act's legislative history: sexual predators do not, *per se*, have mental illness, but have "antisocial personality features which are unamenable to existing mental illness treatment modalities, and for

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[5] K.S.A. § 59-29a02(b): "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

which the prognosis of cure is poor." *Young v. Weston*, 898 F. Supp. 744, 749 (W.D. Wash. 1995). *See also Foucha*, 504 U.S. at 75 (describing antisocial personality as a condition which is not a mental disease);[6] Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL. PUB. POL'Y & L. 534 (1995). Indeed, in the Kansas trial court, Dr. Befort, the state's expert, "testified that he did not believe Hendricks was mentally ill or had a personality disorder but that, as he interpreted the Act, pedophilia was a mental abnormality." *Hendricks*, 912 P.2d at 131.

II. THE AMENABILITY TO, AND AVAILABILITY OF, TREATMENT FOR PEOPLE WITH BONA FIDE MENTAL ILLNESS DISTINGUISHES THEM FROM SEXUALLY VIOLENT PREDATORS

This Court has suggested that a sexual offender commitment statute may be upheld only if it provides bona fide treatment as an alternative to punishment. *Allen v. Illinois*, 478 U.S. 364 (1986). Other federal courts have held that a person who has been civilly committed has a constitutional right to "that treatment as is minimally adequate to provide him a reasonable opportunity to be cured or to improve his mental condition." *Eckherhart v.*

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[6] According to the professional group representing sexual abuse treatment providers, "[s]exual deviance is a learned or acquired behavioral disorder. Treatment is focused on recognizing, changing and managing deviant behavior and the attitudes that promote it. Sexual deviance is not considered to be a disease that can be cured." ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, PRACTITIONERS HANDBOOK 1 (undated).

Hensley, 475 F.Supp. 908 (W.D.Mo. 1979), *aff'd*, 664 F.2d 294 (8th Cir. 1980).

As the Kansas Supreme Court recognized, the state's Sexually Violent Predator Act does not seek to provide treatment, but simply to continue incarceration. *Hendricks*, 912 P.2d at 136. Even without arguing that treatment is constitutionally required, the concession that the mental health system in Kansas does not have the "treatment modalities," K.S.A. § 59-29a01, necessary for sexually violent predators makes clear that the sexually violent predators the Legislature wants to confine differ from people with mental illness who need, and can benefit from, treatment.

As further evidence that the Legislature did not intend to provide treatment to sex offenders, the Court need only consider that Kansas apparently offered none during Hendricks' incarceration. Only on the eve of his release did the issue of treatment arise, and then only to try to justify commitment. As the federal district court, considering the virtually identical Washington statute, held in *Young v. Weston*, the statute "plainly delays the treatment that must constitutionally accompany commitment pursuant to the Statute." 898 F. Supp. at 753. There can be no justifiable purpose in maintaining that a convict is in need of treatment, but then withholding it until the person has served his entire prison sentence. In the end, if there is no treatment, commitment is not permissible.[7]

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[7] "[A] diagnosis of some clear and treatable mental illness seems a necessary prerequisite to the kind of effective treatment that must be provided [under *Allen v. Illinois*]." Comment, *The Importance of Being*

In fact, the professional research supports the Kansas Legislature's finding that there is little, if any, effective treatment for violent sex offenders.[8] It is sex offenders' very non-amenability to treatment with mental health "modalities" that characterizes the statute's purpose as penal rather than rehabilitative. As established by the Kansas legislature, treatment is only an afterthought, tacked on to fulfill the treatment mandate set down by this Court in *Humphrey v. Cady*, 405 U.S. 504 (1972), *Allen* and *Jones*.

By contrast, the facilities to which sexually violent offenders would be committed under the Kansas statute are specifically designed to provide treatment to a population that *is* capable of benefiting from it: people with bona fide mental illness.

III. COMMITTING VIOLENT SEXUAL PREDATORS TO THE MENTAL HEALTH SYSTEM WILL SERIOUSLY HARM PEOPLE WITH BONA FIDE MENTAL ILLNESSES AND FOR THE PUBLIC

By devising a system of civil commitment of sex offenders, Kansas has set the stage for a significant diversion of resources from the mental health system. The

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Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes as Insane Act, 32 HOUS. L. REV. 775, 801 (1995).

[8] *See, e.g.*, W.L. Marshall *et al.*, *Treatment Outcome with Sex Offenders*. 11 CLINICAL PSYCHOL. REV. 465-485 (1994); L. Furby, M.R. Weinrott, & L. Blackshaw, *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3 (1989).

inevitable result of committing sexually violent predators to mental health facilities will be a diversion of resources away from the care of people with treatable mental illness. This funding is to be redirected to a population that the Legislature itself admits is not amenable to mental health treatment, and for which experts hold out very little hope OF effective treatment. Violent sex offenders will be warehoused in state mental hospitals, consuming significant resources, and displacing services for large numbers of law-abiding people with treatable mental illness.

The absence of a mental illness requirement not only makes the Kansas statute constitutionally infirm, but will also result in highly inappropriate state hospital placements.

Eliminating the essential linkage between civil commitment and mental disability destroys the therapeutic function of mental health facilities and the professionals who work in them. By requiring state mental hospitals to confine individuals who have no mental illness, the Kansas statute transforms hospitals into prisons and turns mental health professionals into jailors.

Finally, because the Kansas statute does not provide for the segregation of sexually violent predators from the general hospital population, there is strong reason to believe that they will continue their predatory behavior—whether sexual or otherwise—against people who are especially vulnarable due to their mental illness and their confinement. In the absence of programs to treat the underlying predatory behavior and without experienced

staff, mixing of these populations will have severe, unintended consequences.

IV. CONFINING SEXUALLY VIOLENT PREDATORS IN MENTAL HEALTH FACILITIES WILL FURTHER STIGMATIZE PEOPLE WITH BONA FIDE MENTAL ILLNESS AND DISCOURAGE THEM FROM SEEKING TREATMENT

By forcing the square peg of antisocial behavior into the round hole of "mental illness," the Kansas statute subverts the important progress that has been made in destigmatizing mental health treatment, and encouraging people with mental illness to seek early treatment and support. It also risks trivializing the process of identifying and treating diagnosed mental illnesses. This dilution of the "treatment and recovery" model will have long-lasting, adverse consequences for people with mental illness and for society.

After slow but steady progress in transforming state mental hospitals and other mental health facilities from "warehouses" and "snakepits," *cf.* A. DEUTSCH, THE SHAME OF THE STATES (1948), into more modern, therapeutic communities focused on effective treatments, warehousing violent sex offenders without effective treatment represents a major reversal of course. Sending sexually violent predators to mental health facilities which, as the Legislature has recognized, are largely unequipped to handle their treatment needs, adds to the stigma surrounding mental illness because it promotes the idea that hospitals are not places for recovery, and further inflames

a public that believes that people with mental illness are prone to violence.

The Supreme Court has, on several occasions, recognized that people who seek treatment for mental illness suffer from stigma, which can have have long-term, adverse effects on their lives. *See Vitek v. Jones*, 445 U.S. 480, 492 (1980). In *Addington v. Texas*, 441 U.S. 418, 425 (1979), the Court wrote:

> [I]t is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena "stigma" or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.

Researchers have found that, by itself, stigma discourages people with mental illness from seeking treatment.[9]

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[9] *See, e.g.*, Bernard S. Arons, M.D., Director, Center for Mental Health Services, U.S. Department of Health and Human Services, Remarks to the West Virginia Mental Health Association Annual Meeting, June 16, 1995 ("We still have a society in which the image of mental illness is mixed together with images of violence, of ridicule, of fear, and of misunderstanding....The problem is that, once you get help, you become labeled as `mentally ill,' and you are at risk for social ostracism and public discrimination....Treatments for mental illness are more successful than those for heart disease, angioplasty and many other medical illnesses. Yet, many people do not seek treatment because of the fear of stigma"). *See also* OTTO F. WAHL, MEDIA

"Services will continue to be rejected by large numbers of people until we have dealt with both their internal shame and with the stigmatizing impact of many professional service structures....Stigma is a major impediment to realizing the goals of community mental health."[10]

Stigma also affects public policy. Unfounded stereotypes about the dangerousness of people with mental illness may contribute to public unwillingness to fund mental health services and to provide essential supports such as housing and job training in the community.[11]

Confining violent criminals in facilities for people with mental illness will encourage the false, but widespread, impression that all people with mental illness are

---

MADNESS: PUBLIC IMAGES OF MENTAL ILLNESS 102 (1995) ("Stigma also undermines the search for treatment. Those who are reluctant to acknowledge their disorders are also likely to delay (or avoid altogether) seeking appropriate psychiatric help, because that treatment will itself mark them as undesirable.")

[10] Michael B. Friedman, Research on Stigma (unpublished paper, October 20, 1989), at 3, 16.

[11] "[S]tereotypes of the dangerous mental patient, furthermore, may contribute to the unavailability of needed resources for recovery by fueling opposition to the presence of individuals with mental disorders in the community....And once people do leave psychiatric hospitals--people whose need for support and acceptance may be particularly acute--they are likely to be met instead with suspicion and fear....The end result is that large numbers of people with serious mental illness either remain unnecessarily in isolated hospital environments or add to our growing homeless population because there are too few communities or too few affordable residences in which they are allowed to live." WAHL, *supra* note 9, at 94-95.

violent and unpredictable.[12] Because the public is not well-informed about the origins and treatment of mental illness,[13] it tends not to differentiate between treatable mental illnesses that are not associated with violence and the "mental abnormality" the Kansas statute ascribes to sexually violent predators. By breaking the essential connection between civil commitment and mental illness, the Kansas statute will feed this misunderstanding.

---

[12] Despite significant evidence that well over 90% of people with mental illness do not exhibit violent tendencies the public believes there is a much stronger correlation between mental illness and violence. See WAHL, *supra* note 9, at 80-82. Even those few studies that correlate MI and violence, "these studies do not establish that mental illness itself accounts for the violence demonstrated. For some individuals who are both mentally ill and violent, the mental illness may be irrelevant to the violent or criminal behavior shown. Just as some non-mentally ill individuals rob, assault, or kill for profit or passion, those with mental illnesses may act out of those same "normal" motives....Because mental illness and violence both occur does not necessarily mean that the violence was caused by the mental illness." *Id.* at 79.

[13] *See, e.g.*, THE ROBERT WOOD JOHNSON FOUNDATION PROGRAM ON CHRONIC MENTAL ILLNESS, PUBLIC ATTITUDES TOWARD PEOPLE WITH CHRONIC MENTAL ILLNESS (1990).

CONCLUSION

For the reasons set forth above, *amicus* urges this Court to affirm the decision of the Kansas Supreme Court.

Respectfully submitted,

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OCTOBER TERM, 1996

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Petitioner,

v.

LEROY HENDRICKS,

Respondent.

On Writ of Certiorari to the
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INTEREST OF THE *AMICI CURIAE*

The American Civil Liberties Union (ACLU), is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of individual liberty embodied in the Bill of Rights. The ACLU of Kansas and Western Missouri, the ACLU of Washington, the Minnesota CLU, the ACLU of Wisconsin and the ACLU of Northern California are state affiliates of the ACLU. Statutes similar to the Kansas Act at issue in this case have been enacted in the states in which these affiliates are located.

The ACLU and each of its affiliates maintains a strong and abiding interest in defending citizens' fundamental civil liberties from unconstitutional and unwarranted governmental intrusion. This case raises constitutional issues that are of central importance to the ACLU and its affiliates. In furtherance of its organizational views on these matters, the ACLU has often appeared before this Court, both as direct counsel and as *amicus curiae*. *See, e.g., Foucha v. Louisiana*, 504 U.S. 71 (1992); *United States v. Salerno*, 481 U.S. 739 (1987); *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

On August 8, 1996, pursuant to Rule 37(3)(a), both Petitioner and Respondent consented to the filing of *amicus curie* briefs by any interested groups or organizations. To avoid duplication, the ACLU and its affiliates address the substantive due process issue only. Other *amici* in support of Respondent will address the other constitutional issues raised by the Kansas Act.

STATEMENT OF THE CASE [1]

Just prior to Mr. Hendricks' release from a 10-year prison sentence imposed pursuant to a plea agreement on charges of taking indecent liberties with children, the District Attorney filed a petition seeking to commit him involuntarily under the Kansas Sexually Violent Predators Act ("the Act" or "the Kansas Act").

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[1] *Amici* incorporates by reference the more comprehensive statement of the case provided in Brief of Cross Petitioner.

The Act establishes a procedure by which the State may involuntarily commit sex offenders, ostensibly for long-term care and treatment. 1994 Kan. Laws ch. 316 (codified at Kan. Stat. Ann. § 59-29a01 - 29a17).[2] To confine an individual under the Act, the State of Kansas need establish only that the individual has been convicted of, or in certain cases merely charged with, a single qualifying sex crime at any time in the past and "suffers from a *mental abnormality* or *personality disorder* which makes the person likely to engage in predatory acts of sexual violence." Kan. Stat. Ann. § 59-29a02(a) & (e) (emphasis added).

Even though Mr. Hendricks is not mentally ill, a jury found him to be a "sexually violent predator." Based on the jury's findings, the court ordered Mr. Hendricks involuntarily committed and confined at the Kansas Department of Corrections' Larned Correctional Mental Health Facility. Mr. Hendricks appealed the commitment order to the Kansas State Supreme Court on the grounds that the Act violates several constitutional provisions, including the prohibition against double jeopardy and *ex post facto* laws, the equal protection clause and substantive due process.

The Kansas State Supreme Court ruled that the Kansas Sexually Violent Predators Act violates substantive due process. *In re the Care and Treatment of Hendricks*, 259 Kan. 246, 261,

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[2]The Kansas Act is modeled after a similar statutory scheme enacted in Washington State in 1990. 1990 Wash. Laws ch. 3, §§ 1001-1013 (codified at Wash. Rev. Code § 71.09.010 - .120, as amended). The Washington Sexually Violent Predators Act has been held unconstitutional on substantive due process grounds by the United States District Court for the Western District of Washington. *Young v. Weston*, 898 F. Supp. 744 (W. D. Wash. 1995) *appeal withdrawn pending resolution of this case*, No. 95-35958 (9th Cir., July 31, 1996). Similar sex offenders involuntary civil commitment schemes have been adopted in Wisconsin (1993 Wisc. Laws, Act 479, § 40 (codified at Wisc. Stat. § 980.01 - .13, as amended)); Minnesota (1994 Minn. Laws, 1st Sp., ch. 1, art. I (codified at Minn. Stat. § 253B.02, as amended)); California (1995 Cal. Stat., ch. 762 & 763 (codified at Cal. Welf. & Inst. Code § 6600 - 6608, as amended)); and Arizona (1995 Ariz. Sess. Laws 1st Sess. ch. 257 (codified at Ariz. Rev. Stat. § 13-4601 - 4609, as amended)).

912 P.2d 129 (1996). The Kansas State Supreme Court concluded that the Act does not require a finding of mental illness as a predicate to indefinite, involuntary civil commitment.[3] *Hendricks*, 259 Kan. at 259. The court also concluded that treatment was at best incidental and all but nonexistent for those individuals intended to be committed under the Act: "It is clear that the primary objective of the Act is to continue incarceration and not to provide treatment." *Id.* at 258.

SUMMARY OF ARGUMENT

Initially, the Petitions in this case raised potentially broad and fundamental issues concerning the scope of a state's constitutional authority to commit an individual involuntarily to a psychiatric hospital. In its opening Brief, the State of Kansas has substantially narrowed the issues presented to this Court.

There no longer appears to be any dispute about two ...mental issues. First, the State concedes that the Act is a civil, not criminal, statute and that substantive due process imposes specific limits on the State's power of civil commitment in three specific ways: The individual committed must be mentally ill; he must be dangerous; and finally, he must receive treatment. Each of the State's concessions are compelled by this Court's prior decisions. Second, the State concedes its interest in protecting society could have been met within its existing laws. The State could have sentenced Respondent Leroy Hendricks to a total of 45 to 180 years under sentencing laws in existence at the time he was sentenced. Furthermore, the State could have sought commitment of Mr. Hendricks to a mental health facility for treatment under applicable laws while he was serving his

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[3]The Kansas State Supreme Court is the final authority on the meaning and purposes of Kansas legislation. *Allen v. Illinois*, 478 U.S. 364, 380 (1986). This Court is bound by the Kansas State Supreme Court's construction of a state statute. *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993) ("There is no doubt that we are bound by a state court's construction of a state statute."); *R.A.V. v. St. Paul*, 505 U.S. 377, 380 (1992); *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

prison sentence. If found to be mentally ill, Mr. Hendricks could have received treatment. The State took neither of these actions.

The remaining disputed issues, while less sweeping and fundamental, are nevertheless important ones. First, the State expends considerable effort to suggest the applicability of a rational relationship test rather than a strict scrutiny test, claiming that involuntary civil commitment does not implicate a fundamental liberty interest. To the contrary, this Court has long recognized that indefinite, involuntary civil commitment in a psychiatric hospital implicates the most basic and essential fundamental liberty interest. Under substantive due process analysis, this Court has required that involuntary civil commitment statutes be carefully limited and narrowly tailored to preclude commitment of those individuals to whom the states' legitimate and compelling purposes of commitment are inapplicable. Involuntary civil commitment is designed to treat those individuals who are mentally ill and protect society from those who are dangerous. Thus, in prior substantive due process cases involving involuntary civil commitment, the Court has applied a heightened due process scrutiny standard of review to measure the purposes of commitment.

Second, the State of Kansas in its Brief proposes to replace the Act's constitutionally defective definition with a new definition of "mental abnormality." The State's proposed definition, however, also suffers from a number of significant defects. In rewriting the statute so that it only reaches individuals with psychiatric diagnoses, the State ignores the language of the statute, its legislative history and the authoritative interpretation of the Act by the State's highest court. The State's newly proposed definition cannot satisfy the constitutional mental illness requirement that would permit commitment. Finally, the real purpose in adopting this Act was to extend incarceration for sex offenders who already have been sentenced, and not to provide *bona fide* treatment for persons who are mentally ill. The structure of the statute and its legislative history demonstrate that treatment is simply a pretext

for what really is continuing punishment for sex offenders beyond the time they lawfully may be confined.

ARGUMENT

I.
DEPRIVATION OF A FUNDAMENTAL LIBERTY INTEREST WARRANTS A HEIGHTENED SCRUTINY STANDARD OF REVIEW

The State of Kansas misleadingly contends that this Court has never applied strict scrutiny, an equal protection standard of review, to a substantive due process claim in an involuntary civil commitment case. State's Brief at 21. The Court, however, has applied a heightened scrutiny standard of review when fundamental liberty interests are implicated, such as freedom from indefinite, involuntary civil commitment in a psychiatric hospital. *See Foucha*, 504 U.S. at 80-81. In an effort to avoid application of the heightened scrutiny standard in this case, the State erroneously argues that no fundamental right is implicated by the Kansas Act. State's Brief at 25. This argument is based on a misreading of this Court's opinion in *Foucha*.

A. Freedom from Indefinite, Involuntary Civil Commitment in a Psychiatric Hospital Is a Fundamental Liberty Interest

It is hard to imagine a more fundamental liberty interest than freedom from indefinite incarceration. Freedom from unwarranted and unjustified governmental confinement is at the heart of the Bill of Rights. This Court repeatedly has recognized that potentially indefinite, involuntary civil commitment in a psychiatric hospital is a "significant deprivation" and "massive curtailment" of liberty. *Foucha*, 504 U.S. at 80; *Jones v. United States*, 463 U.S. 354, 361 (1983); *Addington v. Texas*, 441 U.S. 418, 425 (1979); *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). The right to be free from such confinement is the very essence and the core of the liberty protected by the Due Process Clause. *Foucha*, 504 U.S. at 80; *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982).

> As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution.

Foucha, 504 U.S. at 90 (Kennedy, J., dissenting). "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). The Court has "always been careful not to minimize the importance and fundamental nature of the individual's right to liberty." *Id.* at 750.

The Court has defined the physical liberty interest implicated by involuntary civil commitment statutes in two ways: First, as the freedom from bodily restraint; *Foucha*, 504 U.S. at 80; *see also Reno v. Flores*, 507 U.S. 292, 315 (1993) (O'Connor, J., concurring) ("Freedom from bodily restraint means more than freedom from handcuffs, straitjackets or detention cells."); and second, as freedom from indefinite involuntary confinement in a psychiatric hospital; *Foucha*, 504 U.S. at 82; *Addington*, 441 U.S. at 425; *Zinermon v. Burch*, 494 U.S. 113, 131 (1990). The loss of liberty produced by indefinite, involuntary civil commitment is more than just a loss of freedom from confinement, but engenders significant adverse stigmatizing consequences and unjustified intrusions on personal security, such as compelled treatment. *Vitek v. Jones*, 445 U.S. 480, 492 (1980). There simply is no doubt that the liberty interest implicated by the Kansas Act, whatever way it is defined, is a fundamental right.

B. The Heightened Due Process Scrutiny Standard of Review Applies When A Fundamental Liberty Interest Is Implicated

The State is simply wrong in arguing that only a reasonableness test should apply. Under substantive due process analysis, the Court consistently has applied a rigorous standard

of review whenever a State attempts to infringe on a fundamental liberty interest through incarceration, involuntary civil commitment or preventive detention. In describing the standard in *Reno v. Flores*, 507 U.S. 292 (1993), Justice Scalia, writing for the majority, articulated when heightened scrutiny applies to a substantive due process claim:

> [T]he Fifth and Fourteenth Amendments' guarantee of "due process of law" . . . include[s] a substantive component, which forbids the government to infringe certain "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.

Id. at 301-02.

Consistent with this standard, the Court in *United States v. Salerno*, 481 U.S. 739 (1987), upheld a federal statute permitting pretrial detention of individuals charged with serious crimes and considered dangerous only because the State's interest was "both legitimate and compelling" and because the statute was "carefully limited" as to the circumstances under which such detention was permitted and "narrowly focused" on a particularly acute problem in which the government interests were overwhelming. *Id.* at 749-50. In *Foucha*, by contrast, the Court struck down on substantive due process grounds a Louisiana statute that permitted continued indefinite detention in a state psychiatric institution of criminal defendants acquitted by reason of insanity. *Foucha*, 504 U.S. at 83. The statute allowed such detention, even though the insanity acquitees had regained their sanity, until they could prove that they were no longer dangerous. *Id.* In comparing the Louisiana act in *Foucha* to the federal pretrial detention act in *Salerno*, the Court stated that "[u]nlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of confinement is not carefully limited." *Foucha*, 504 U.S. at 81.

In *Foucha*, all members of the Court acknowledged that a heightened due process scrutiny standard applied when the State

seeks to deprive an individual of his fundamental liberty interests. *Id.* at 93 (Kennedy, J., dissenting) ("We have often subjected to heightened due process scrutiny, with regard to both purpose and duration, deprivations of physical liberty imposed before a judgment is rendered under this standard."); *id.* at 115 (Thomas, J., dissenting) ("Certain substantive rights we have recognized as 'fundamental'; legislation trenching upon these is subjected to 'strict scrutiny,' and generally will be invalidated unless the State demonstrates a compelling interest and narrow tailoring.") Thus, citing to both *Salerno* and *Foucha*, Justice O'Connor in her concurrence in *Reno* agreed that this heightened scrutiny standard applied in substantive due process analysis. *Reno*, 507 U.S. at 316 (O'Connor, J., concurring) ("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny.").

The cases relied upon by the State for its assertion that mere reasonableness review applies can be distinguished on their facts. In several of the cases discussed in the State's Brief, the individual facing a restraint of liberty was already validly confined by the state. The issue confronted by the Court in those cases was simply how and where the individual would be confined, not whether the individual's initial loss of liberty was appropriate. *See, e.g., Youngberg*, 457 U.S. at 316 (concerning whether state had adequately protected liberty interests in personal security, freedom of movement and from bodily restraints, and adequate care and treatment while confined); *Jones*, 463 U.S. at 356 (issue was whether person, who was indisputably mentally ill and dangerous, nonetheless was entitled to release because he had been hospitalized for period longer than he might have served in prison). By contrast, Mr. Hendricks has fully served his criminal sentence and should have been released into society. Were it not for the Kansas Act, Mr. Hendricks would be free.[4]

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[4]The other cases concerned procedural, not substantive, due process. *See Allen v. Illinois*, 478 U.S. 364 (1986); *Addington v. Texas*, 441 U.S. 418 (1979). In *Heller v. Doe*, 509 U.S. 312 (1993), the Court did not apply heightened scrutiny because the issue of the appropriate standard of review was not properly before the Court. Respondent had relied on the reasonableness standard in the lower courts and had not argued for a more rigorous standard until his initial brief in the Supreme Court. *Id.* at 319.

The State's Brief attempts to minimize the importance and fundamental nature of an individual's freedom from indefinite, involuntary civil commitment in a psychiatric hospital, contrary to this Court's precedent. Not only has this Court long recognized the fundamental nature of this liberty interest, but the Court has used a heightened due process scrutiny standard to examine statutes that seek to infringe on it.

II.
THE ACT VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT SEEKS INDEFINITE INCARCERATION FOR INDIVIDUALS WHO ARE NOT MENTALLY ILL

Whatever substantive due process standard the Court applies, the Kansas Sexually Violent Predators Act is unconstitutional. Because involuntary civil commitment to a psychiatric hospital results in a deprivation of one's fundamental liberty interests, even more severe than that resulting from a criminal conviction, the Constitution limits the circumstances when the State may commit an individual involuntarily. Involuntary civil commitment is constitutionally permissible only for treatment of individuals who are mentally ill and to protect society from individuals who are dangerous. *Foucha*, 504 U.S. at 77; *Jones*, 463 U.S. at 368; *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975). People who are mentally ill, but not dangerous, *O'Connor*, 422 U.S. at 575, or people who are not mentally ill but are considered dangerous, *Foucha*, 504 U.S. at 77, cannot be confined because they do not fit the strict purposes of confinement. The Kansas Act, labeled civil commitment, in reality is intended to extend indefinitely the confinement of sex offenders considered dangerous, but who are not mentally ill, even though they have completed their judicially imposed incarceration and are legally entitled to be released.

A. The Act Fails To Satisfy the Constitutional Mental Illness Requirement As a Predicate For Indefinite, Involuntary Civil Commitment

The absence of any mental illness requirement is apparent in both the statutory language and legislative history. The Kansas Legislature acknowledged that, in contrast to persons appropriate for civil commitment under the State's involuntary treatment statute for the mentally ill, individuals subject to indefinite, involuntary civil commitment as sexually violent predators "do not have a mental disease or defect" that is amenable "to existing mental illness treatment." Kan. Stat. Ann. § 59-29a01.[5] The Act itself does not characterize these persons as mentally ill in any clinically meaningful sense, but rather targets individuals who "generally have antisocial personality features." *Id.* Moreover, the terms "mentally ill" or "mentally disordered" appear nowhere in the Act, reinforcing the Legislature's recognition that these sex offenders are neither mentally ill nor appropriate for involuntary civil commitment in a psychiatric hospital. The legislative history further establishes that the Act was intended to incapacitate individuals who presently are not mentally ill, and thus could not be subject to civil commitment. Those testifying for and against this Act agreed that individuals subject to confinement under the Act are not mentally ill.

1. Neither the Statutory Definition Nor the State's Proposed Definition of "Mental Abnormality" Satisfy the Constitutional Requirement For Mental Illness

As the Kansas State Supreme Court found in *Hendricks*, "mental abnormality" is not a psychiatric or medical term.

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[5]Ironically, the Act would apply, *inter alia*, to a sex offender who is due to be released from the Kansas mentally ill offender system. Kan. Stat. Ann. § 59-29a02. In other words, an individual who was once mentally ill and confined, but whom the State now says is no longer mentally ill, nevertheless, is subject to confinement under this Act.

Hendricks, 259 Kan. at 260. "Mental abnormality" has no clinically significant meaning or recognized diagnostic use among treatment professionals. *Id.*; *see also* Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predators Statute*, 15 U. Puget Sound L. Rev. 597, 601-02 (1992) (definition of "sexually violent predator" in similar Washington Act fails to coincide with clinical or empirical knowledge regarding sex offenders). Dr. Charles Befort, the State's chief psychologist at Kansas's Larned Correctional Mental Health Facility, testified that the term mental abnormality "is a phrase used by clinicians to discuss abnormality or deviance, but that it is not itself a diagnosis." J.A. 229-33; *see also Hendricks*, 259 Kan. at 260. Under the Act, mental health professionals must evaluate whether an individual suffers from a "mental abnormality" without reference to any clinically meaningful definition. The Kansas Legislature's decision to use a term unrecognized by mental health professionals confirms that the State sought to commit persons who are not mentally ill.

Under the Act's definition, the basis for finding that the individual suffers from a "mental abnormality" is derived solely from that person's past criminal sexual behavior, which in turn is used to establish that person's predisposition to future dangerous sexual behavior.[6] Kan. Stat. Ann. § 59-29a01. As Dr. Befort

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[6]As the Court stated in *Heller v. Doe*, 509 U.S. 312, 322 (1993):

> Manifestations of mental illness may be sudden, and past behavior may not be an adequate predictor of future actions. Prediction of future behavior is complicated as well by the difficulties inherent in diagnosis of mental illness. . . . It is thus no surprise that psychiatric predictions of future violent behavior by the mentally ill are inaccurate.

Id. at 323-24. Past actions that may have evidenced mental illness or dangerousness are not sufficient to support a finding of current mental illness sufficient to deprive an individual of his liberty. Moreover, a criminal act by definition is not "within a range of conduct that is generally acceptable." *Jones*, 463 U.S. at 366 (citing *Marshall v. United States*, 414 U.S. 417, 426-427 (1974)). A convicted criminal *a priori* has engaged in abnormal conduct. It is obvious, however, that the mere fact of prior criminal conduct is not constitutionally sufficient to support a finding that a convict is mentally ill for

admitted, this definition is simply a tautology that past criminal behavior is used to predict an individual's potential for future criminal behavior. *See Hendricks*, 259 Kan. at 260 (definition of mental abnormality is circular); Rideout, *So What's in a Name? A Rhetorical Reading of Washington's Sexually Violent Predators Act*, 15 U. Puget Sound L. Rev. 781, 793 (1992) (discussing the tautology that sexually violent predators have features that lead to sexually violent behavior). The definition is simply a description of the causes for any behavior. Morse, *Symposium: Blame and Danger: An Essay on Preventive Detention*, 76 B.U.L. Rev. 113, 137 (1996) (a "congenital or acquired condition" includes all possible biological and environmental causes).

Recognizing that the Act does not require a mental illness as a predicate to indefinite, involuntary civil commitment, the State in its Brief attempts to invent a new definition of "mental abnormality." Contrary to the plain language of the statute, its legislative history and the Kansas State Supreme Court's interpretation of the Act, the State's Brief redefines "mental abnormality" to mean any identifiable mental disorder that any mental health professional determines may make a person dangerous. State's Brief at 40-42. The State admits that, on its face, the statutory definition of "mental abnormality" is unconstitutionally imprecise. The State argues, nevertheless, that mental health professionals will give the definition content when they identify specific mental disorders that satisfy the definition. *Id.* at 40. This novel revision does not satisfy the constitutional mental illness requirement.

Under the revised definition offered in the State's Brief, any identifiable mental disorder that makes the person dangerous may serve as a basis for indefinite, involuntary civil commitment.

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purposes of involuntary civil commitment. Were that the case, all criminal convicts would be considered mentally ill. Worse, if the prior criminal acts are relied upon to prove future dangerousness, all criminal convicts would be automatically subject to civil commitment. This cannot be the case.

State's Brief at 42. Not all mental disorders, however, are mental illnesses. Nor do all mental disorders included in the DSM-IV constitute mental illnesses.[7] In *Foucha*, this Court rejected the argument that simply because a disorder is listed in the DSM it is a mental illness sufficient for involuntary civil commitment. *Foucha*, 504 U.S. at 78. For example, the DSM-IV lists as mental disorders "Caffeine-Induced Disorder," "Nicotine-Induced Disorder" and "Male Erectile Disorder," among others. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 212, 244 & 502 (4th ed. 1994) (DSM-IV). The State of Kansas cannot dispute that these mental disorders do not warrant involuntary civil commitment.[8] At the same time, not all recognized or identifiable mental disorders are included in the DSM-IV. The State never defines what is required to be a recognized identifiable mental disorder. Thus, under the State's definition, a person could be indefinitely, involuntarily committed based on any mental health professional's opinion that the person suffers from a recognized identifiable mental disorder, whether or not that "disorder" is found in the standard diagnostic text upon which all mental health professionals rely.

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[7]The fact that a condition like anti-social personality is discussed and identified by psychiatrists as a "personality disorder" does not render it a "mental illness" for legal purposes. The American Psychiatric Association and other mental health professional organizations have acknowledged this limitation. "It is to be understood that inclusion here, for clinical and research purposes, of a diagnostic category such as pathological gambling or pedophilia, does not imply that the condition meets legal or other non-medical criteria for what constitutes mental disease, mental disorder, or mental disability." DSM-IV at xxvii (Cautionary Statement).

[8]It is true that commitment requires dangerousness as well as mental illness. It is not difficult to imagine an argument that most of the possible disorders carry with them a component of dangerousness. Thus, for example, nicotine addiction is a psychiatric diagnosis that carries the risk of lung cancer and other disease, but would not justify commitment.

2. The Act's Attempt to Define Mental Illness Is Directly Contrary to this Court's Holding in *Foucha*

Although the Act employed two bases for civilly committing a sex offender — mental abnormality and personality disorder — the State's Brief focuses only on mental abnormality. The term "personality disorder" is not defined in the Act, nor does the State attempt to define it for this Court.[9] The State's Brief offers no explanation for what causes a "personality disorder" nor does it describe the mental processes or functions that are impaired by such a disorder. Even more troubling, the definition of "mental abnormality" in the State's Brief obviously encompasses "personality disorders." Under the revised definition offered by the State, personality disorders are now a subset of mental abnormalities. This proposed definition is so broad that it is unconstitutional under this Court's holding in *Foucha*.

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[9]The Kansas State Supreme Court found that "personality disorder" is not a mental illness. *Hendricks*, 259 Kan. at 261. Although the term "personality disorder" has a recognized clinical meaning, there is no personality disorder peculiar to sex offenders. *Young v. Weston*, 898 F. Supp. 744, 750 (W.D. Wash. 1995). In the descriptive classification system of mental disorders universally recognized by mental health professionals, a personality disorder is characterized by maladaptive behavior, but criminal sexual behavior alone is not a basis for such a diagnosis. DSM-IV at 630. A personality disorder has no underlying biochemical or medical etiology and, as the Legislature acknowledged, is not a condition that is treatable with the tools of a psychiatric hospital. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 3 Psych., Pub. Policy & Law 534 (1995). It neither impairs cognitive processes so as to render the individual incompetent to make hospitalization and treatment decisions, nor does it substantially impair volitional processes so as to prevent the individual from controlling himself. *See* Schopp & Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 1 Behav. Sci. & Law 437 (1995); Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus on Therapeutic Jurisprudence*, 1 Psych., Pub. Policy & Law 161 (1995). Like the definition of "mental abnormality," the Act's use of "personality disorder" is circular in that "'the only observed characteristic of the disorder is the predisposition to commit sex crimes.'" *Hendricks*, 259 Kan. at 261.

Moreover, both the Act's and the State's definitions merge the two constitutional requirements for civil commitment — mental illness and dangerousness. Under these definitions, whether a qualifying mental abnormality exists depends upon whether the individual is considered dangerous. Under the Act, for example, the determination of a mental abnormality is based on a person's propensity to commit a violent crime. Kan. Stat. Ann. § 59-29a01. Under the revised definition in the State's Brief, a person who suffers from a mental abnormality has an identifiable mental disorder that makes them particularly dangerous. State's Brief at 42. Thus, the Act is unconstitutional because it really requires only a showing of dangerousness, contrary to *Foucha*.

This Court in *Foucha* held that a person could not be involuntarily committed as mentally ill merely because he suffers from an "antisocial personality disorder" or "personality disorder" that purportedly makes him dangerous to himself or others.

> [T]he State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. *The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.*

Foucha, 504 U.S. at 82-83 (emphasis added). The Court described exactly what has become the Kansas Act, as interpreted in the State's Brief and by the Kansas State Supreme

Court. It seeks to confine individuals who are not mentally ill, and whose past criminal conduct was not caused by mental illness, simply because they are perceived as dangerous. *See* Comment, *Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law and An Unwise Policy Choice*, 14 U. Puget Sound L. Rev. 105, 122 (1990). In *Foucha*, all members of the Court agreed that civil commitment requires a finding of mental illness and that neither "antisocial personality" nor "personality disorder" constitute mental illness. *Foucha*, 504 U.S. at 97 (Kennedy, J., dissenting) ("[p]resent sanity would have relevance if petitioner had been committed as a consequence of civil proceedings"); *id.* at 113-14 (Thomas, J., dissenting) ("Louisiana cannot possibly extend Foucha's incarceration by adding the procedures afforded to civil committees, since it is impossible to civilly commit someone who is not presently mentally ill."). Just as Louisiana could not involuntarily commit Foucha to a psychiatric hospital based on an "antisocial personality disorder," Kansas cannot commit sex offenders to a psychiatric hospital based on a personality disorder.

3. The State's Definition of the Mental Condition Sufficient for Commitment under the Act Is Unconstitutional Because it Does Not Require Any Impairment of Reasoning Ability

Because the State's Brief defines the mental illness requirement of the Act so broadly that it encompasses behavior that this Court found in *Foucha* is not mental illness, it is not necessary for the Court to address the question initially presented by this case — namely, the substantive due process limitation on the ability of a state to define a behavior or condition as a mental illness, and thereby subject an individual to involuntary civil commitment. Understandably, this Court has not rushed to define with specificity the precise contours of this due process limitation. The concept of mental illness, its etiology, diagnosis and treatment have and will change over time as science achieves increased understanding of mental processes. Attempting to

specify the exact parameters of the concept would be premature and unwise at this time. Several principles, nevertheless, can be stated with relative certainty.

The definition of mental illness is a legal question, not purely a medical one. Given that, and given the changing concept of mental illness, there must be some latitude for state legislatures in attempting to provide a precise definition. The state legislatures are not free, however, to define any condition or behavior as mental illness as a predicate for involuntary civil commitment. Thus, in *Foucha*, the Court found that "personality disorder," although recognized by the psychiatric profession as an identifiable mental disorder, was not a condition that could be considered a mental illness for purposes of involuntary civil commitment. *Foucha*, 504 U.S. at 82-83. Homosexuality was once considered by the psychiatric community as a mental illness, but no one could seriously contend that the due process clause would permit civil commitment of an individual because of his sexual preference. A variety of other examples from recognized psychiatric diagnoses could be identified that would be insufficient, as a matter of due process, to justify commitment. The essential function of the due process limitation on what the State can denominate as "mental illness" is to prevent pretexts designed to justify incarceration by evading other constitutional limitations.

The common denominator of all the legal definitions of mental illness (incompetence to stand trial, insanity and civil commitment) that could justify depriving a person of physical liberty is that the individual involved suffers from a significant impairment in his or her ability to reason, to understand that a problem in reasoning exists and to plan for a method of solving that problem. Morse, *Symposium*, 76 B.U.L. Rev. at 135-36 ("nonresponsibility is usually a necessary condition of justifiable involuntary civil commitment under the standard account of civil and criminal confinements"). At a minimum, due process prohibits commitment of someone who does not suffer this significant impairment of reasoning ability.

By contrast, the Respondent and others who have committed similar sex offenses have no such impairment. Typically, they have planned, executed and often attempted to cover their behavior with conscious clarity. Their goals and behavior are incomprehensible to most people and morally unacceptable to virtually all, but the means by which they carried out those purposes typically are logical and rational. This behavior is clearly within the power of the State to sanction and punish severely as criminal conduct, but it does not involve significant impairment of understanding or reasoning ability, unless the individual also has a recognized mental illness. Therefore, it cannot, consistent with the due process clause, serve as the basis for civil commitment.

B. The Act's Real Objective Is Indefinite Incarceration and Not *Bona Fide* Treatment

The State has a legitimate and compelling interest under its *parens patriae* powers in providing care and treatment to its citizens who are unable to care for themselves. *Addington*, 441 U.S. at 426. When an individual is not mentally ill, involuntary civil commitment in a psychiatric hospital for any length of time offends substantive due process because it is not medically justified. *Foucha*, 504 U.S. at 82-83; *id.* at 88 (O'Connor, J., concurring) (individual can not be confined as mental patient absent some medical justification for doing so); *id.* at 113-114 (Thomas, J. dissenting) ("[I]t is impossible to civilly commit someone who is not mentally ill."). The Kansas State Supreme Court has concluded that the Act does not provide the constitutionally required treatment:

> It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent.

Hendricks, 259 Kan. at 258.

1. The Kansas Legislature Acknowledged That Treatment Is Not Possible for Those Committed Under the Act

The Kansas Legislature's purpose in seeking to commit these individuals involuntarily to a psychiatric hospital was simply to extend their incarceration, not to provide any *bona fide* treatment. Indeed, the Legislature recognized that no realistic prospect for treatment or release exists:

> [T]he prognosis for rehabilitating sexually violent offenders in a prison setting is poor, the treatment needs of this population are very long-term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for [under the State's involuntary treatment statute].

Kan. Stat. Ann. § 59-29a01 ("[S]exually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities"). In light of these findings and as a pretext to what really is indefinite incarceration of persons who are not mentally ill, the Kansas Legislature nevertheless added a provision that "[t]he involuntary detention or commitment of persons under this act shall conform to constitutional requirements for care and treatment." Kan. Stat. Ann. § 59-29a09. The Kansas Legislature offered the "promise of treatment . . . only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits." *Cross v. Harris*, 418 F.2d 1095, 1107 (D.C. Cir. 1969).

2. The Act Deliberately Defers Evaluation, Diagnosis and Treatment of Those It Considers Mentally Ill

The Act itself demonstrates that the Legislature's inclusion of treatment was disingenuous and illusory. Unlike other involuntary civil commitment statutes, the Kansas Sexually Violent Predators Act deliberately defers evaluation, diagnosis

and treatment of convicted sex offenders until they have served their full criminal sentence. Kan. Stat. Ann. § 59-29a03(a) (notice is given 90 days prior to anticipated release from total confinement of person meeting statutory criteria). Only after he has been found fully responsible for his conduct and punished for the offense that will be used as the basis to involuntarily commit him does the State recognize the onset of a "mental abnormality" or "personality disorder" that requires treatment.

> Of course, it defies reason to suggest that the mental abnormalities or personality disorders causing violent sexual predation surface only at the termination of a prison term. Common sense suggests that such mental conditions, if they are indeed the cause of sexual violence, are present at the time the offense is committed.

Young v. Weston, 898 F. Supp. 744, 753 (W.D. Wash. 1995).

By contrast, any rational and *bona fide* involuntary treatment scheme would seek to diagnose the illness and provide treatment as soon as the symptoms of the purported disorder manifest themselves rather than requiring the person to wait years before providing any treatment. Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predators Act*, 15 U. Puget Sound L. Rev. 597, 617 (1992). Any diagnosis based on criminal conduct occurring years before is likely to be highly inaccurate and any treatment based on such diagnosis is likely to be inappropriate and ineffective. *Id.* The Act's deliberate deferral of even the pretense of evaluation, diagnosis and treatment confirms that the real purpose of the Act is not to provide mental health treatment to mentally ill individuals, but rather to extend indefinitely the incarceration of sex offenders.

3. Kansas Intends to Punish Those it Seeks to Commit under the Act Contrary to *Allen*

This Court in *Allen v. Illinois*, 478 U.S. 364 (1986), reiterated the long standing constitutional principal that if the statutory scheme is so punitive, either in purpose or effect, as to negate the State's therapeutic intention, it cannot be considered

a civil statute; but rather it is a criminal statute. *Id.* at 369. *Allen* involved the constitutionality of the Illinois Sexually Dangerous Persons Act, Ill. Rev. Stat. ch. 38, § 105-3, which permitted indeterminate commitment of persons for treatment in lieu of conviction and punishment. *Allen*, 478 U.S. at 373. Central to the Illinois statutory scheme was the requirement that the State elect either punishment or treatment, but not both, at the time the offender is charged. *Id.* at 369-70. In holding that proceedings under the Illinois statute were civil rather than criminal, the Court in *Allen* found that "the State has disavowed any interest in punishment, has provided for the treatment of those it commits, and has established a system under which committed persons may be released after the briefest time in confinement." *Id.* at 370.

Thus, to pass constitutional muster, an involuntary civil commitment scheme requires the State to disavow any interest in punishment and to provide care designed to treat the individual for the condition for which he is confined. *Accord Jones*, 463 U.S. at 369; *Addington*, 441 U.S. at 428. The Kansas Sexually Violent Predators Act, of course, does not disavow punishment, but instead explicitly requires the State to first extract a full measure of punishment before declaring the individual subject to indefinite, involuntarily commitment in a psychiatric hospital ostensibly for treatment. Such a statutory structure belies the State's professed intention to provide treatment.

4. In Reality the Kansas Legislature Sought Indefinite Preventive Detention Contrary to *Salerno*

The Kansas State Supreme Court found that the "primary objective of the Act is to continue incarceration and not to provide treatment." *Hendricks*, 259 Kan. at 258. Only under carefully limited and narrowly focused circumstances has the Court permitted the State to detain or incarcerate an individual for non-punitive reasons pending judicial proceedings. *Salerno*, 481 U.S. at 747-51; *Schall v. Martin*, 467 U.S. 253, 269-70

(1984).[10] Examination of the Act and its legislative history inexorably leads to the conclusion that its purpose is to confine indefinitely an individual solely because he is considered dangerous and at risk of reoffending.

The Kansas Act was part of a larger set of laws intended to deal with sex offenders. 1994 Kan. Laws ch. 252 (codified at various sections of Kan. Stat. Ann. titles 21 & 22). Concluding that criminal sentences for sex offenders were too lenient, the Kansas Legislature passed a number of measures that increased the penalties for certain sex offenses and permitted further enhanced sentences for defendants designated "predatory sex offenders." Kan. Stat. Ann. § 21-4176(a)(G)(i)(b),(ii). While these provisions permitted extended incarceration of individuals who might commit crimes in the future, standing alone they could not address the public's concern over individuals already incarcerated for sex offenses who would someday be released. The Kansas Sexually Violent Predators Act was devised as a way

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[10]In *Salerno* and *Schall*, the Court authorized detention for stringently limited periods of time. In *Salerno*, for example, the Court upheld a federal act authorizing pretrial detention of defendants deemed dangerous. *Salerno*, 481 U.S. at 755. The purpose for the detention in *Salerno* was to detain the defendant only until the government could provide the full procedures required by the criminal justice system, not to detain them indefinitely without ever having a full criminal trial. The Court noted that preventive detention under the act was "limited by the stringent time limitations of the Speedy Trial Act." *Id.* at 747. Similarly, in *Schall*, the Court upheld a state statute authorizing the preventive detention of juveniles accused of crimes who were deemed dangerous. *Schall*, 476 U.S. at 269-70. In that case, the Court noted that the maximum possible detention under the act was only 17 days. *Id.* Other preventive detention statutes which the Court has approved likewise have allowed detention only for stringently limited periods. *See Reno v. Flores*, 507 U.S. 292 (1993) (approving regulatory detention of juvenile aliens pending deportation); *Bell v. Wolfish*, 441 U.S. 520 (1979) (pre-trial detention permissible when arrestee presents risk of flight); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (approving post-arrest detention of individual pending probable cause determination by neutral magistrate); *Carlson v. Landon*, 342 U.S. 524 (1952) (finding no absolute barrier to detention of potentially dangerous resident alien pending deportation).

to extend the periods of incarceration for individuals considered dangerous beyond their lawful terms of criminal confinement and potentially for the rest of their lives.

The legislative history of the Act confirms that it was designed to address the perceived deficiencies of criminal sentencing of sex offenders currently incarcerated in Kansas and to detain sex offenders about to be released from prison. In describing these perceived deficiencies, Robert Stephan, then Attorney General of the State of Kansas, testified:

> Under the provisions of the sentencing and parole system in effect prior to July 1, 1993, a violent sex offender could serve the full sentence and be released without any relevant safeguards for the public. In the same manner under the sentencing guidelines, a violent sex offender will be released at the end of the sentence imposed. With either system, there has been no adequate legal provision to continue incarceration of violent sexual predators past the period of mandatory incarceration.

J.A. 468-69. In his testimony to the Legislature, Attorney General Stephan identified the Act's real objective as "a law that will keep dangerous sex offenders confined past their scheduled prison sentence." *Id.* Carla Stovall, then a member of the Kansas Parole Board and currently Kansas' Attorney General, also described the goal of the Act to continue incarceration of sexually violent offenders by keeping them "locked up indefinitely." J.A. 478. Attorney General Stovall stated her view that "We cannot open our prison doors and let these animals back into our communities." J.A. 475-76.

No Supreme Court decision has ever authorized indefinite, involuntary civil commitment in a psychiatric hospital solely because an individual was considered likely to commit a crime in the future. That is precisely what this Court refused to do in *Foucha*. In that case, the State of Louisiana argued that the Court's opinion in *Salerno* authorized preventive detention for persons who pose a danger to the community. *Foucha*, 504 U.S.

at 81. The Court rejected that argument and distinguished *Salerno* on grounds that the statue was narrowly focused and carefully limited to stringent time limitations. *Foucha*, by contrast, had no time limitations and, indeed, was indefinite. Confinement of an individual entitled to his freedom to prevent conjectural crime is the very essence of indefinite, preventive detention condemned by both the majority and dissent in *Foucha*.

CONCLUSION

Like the statute in *Foucha*, the Kansas Sexually Violent Predators Act is fundamentally flawed. Its scope is broad, covering any crime that may have been sexually motivated. It is based solely on predictions of dangerousness. Its duration is indefinite. Unlike the statutes at issue in *Salerno* or *Schall*, the Act produces indefinite incarceration. A state cannot under the guise of civil commitment continue the confinement of individuals who have paid their debt to society and are entitled to their liberty simply because they are considered at risk of reoffending. The Act could not be sustained under *Salerno*, and is unconstitutional under *Foucha*. For the reasons set forth above, *amici* urge this Court to affirm the decision of the Supreme Court of the State of Kansas.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

STATE OF KANSAS,

Petitioner,

v.

LEROY HENDRICKS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF OF THE ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTRODUCTION

The Association for the Treatment of Sexual Abusers (ATSA) is a non-profit international organization consisting of over 1,100 professionals who specialize in the research, treatment, assessment and supervision of sexual abusers. ATSA's membership is drawn from all fifty states and nine foreign countries. The membership includes the most prominent clinicians and researchers in the field. Clinical membership requires an advanced degree in a recognized mental health profession plus 2,000 additional hours of experience in evaluating and treating sexual offenders. The ATSA Code of Ethics and Standards of Practice is an internationally recognized guide for the evaluation and treatment of sexual offenders.

ATSA appears as amicus curiae to address the Kansas Supreme Court's invalidation of the Kansas Sexually Violent Predator Act, Kan. Stat. Ann. § 59-29a01 *et seq.*, ("KSVPA") on substantive due process grounds. The Kansas court determined that Kansas' law, although requiring proof of a "mental abnormality" or "personality disorder," allows for the commitment of persons who are not mentally ill. This holding is based, in part, on the court's observation that the term "mental abnormality" has no clinical definition, "could not be used appropriately in a formal diagnosis," and is "not a psychiatric or medical term but, rather, a legal term defined in the Act."[1] *In the Matter of the Care and*

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[1]The U.S. District Court in *Young v. Weston*, 898 F. Supp. 744, 750 (W.D. Wash. 1995) concluded in a challenge to a similar Washington State statute that the term "mental abnormality" has "neither a clinically significant meaning nor a recognized diagnostic

Treatment of Hendricks, 912 P.2d 129, 137-38 (Kansas 1996).

ATSA takes no position on the validity of the KSVPA. ATSA is concerned, however, that certain arguments adopted by the Kansas Supreme Court are not consistent with current clinical practices and reflect an incomplete understanding of the diagnostic process. Specifically, contrary to the Kansas court's finding, the KSVPA's operative term "mental abnormality" does have specific meaning to trained mental health professionals which is determined in a manner familiar to those professionals. Second. ATSA is concerned that the Kansas court misconceives the diagnostic process when it dismisses the definition of the term "mental abnormality" as circular. Finally, ATSA wishes to remove the impression left by the Kansas court that sex predators cannot be treated.

ARGUMENT

A. "MENTAL ABNORMALITY," AS DEFINED BY KANSAS' SEX PREDATOR STATUTE, HAS MEANING TO EXPERTS TRAINED IN THE TREATMENT AND ASSESSMENT OF SEX OFFENDERS.

The KSVPA requires, as a precondition to commitment, a judicial finding that the defendant suffers from a "mental abnormality," a personality disorder, or both. The Kansas Supreme Court correctly noted that the term "mental abnormality" is statutory, rather than

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use," is "unrecognized in the psychiatric community" and is of "no value to treatment professionals."

clinical, in origin. The relevant question, though, is not whether clinicians or the legislature created this term, but whether experts in the treatment and assessment of sex offenders can derive clinical meaning from this term. The answer to this latter question is clearly "yes."

1. "Mental Abnormality" is governed by its statutory definition, and its clinical meaning is derived when professionals give it specific content.

While the term "mental abnormality" does not have a clinical definition, the term has been frequently used in mental health law.[2] As a legal term, its application is governed by its statutory definition, as are other legal terms such as "insane," "incompetent," and "gravely disabled."

Like other broad legal classifications of psychiatric or psychological conditions (such as mental illness, mental disorder, mental disease, and mental defect), the term "mental abnormality" becomes clinically meaningful when a psychologist or psychiatrist gives it specific content. Even the universally accepted terms "mental disorder" and "mental illness" are not meaningful if not given further specific content. No mental health professional would, for example, report or testify simply that a particular individual is "mentally disordered" or "mentally ill." Such testimony would be vague, conclusory and devoid of clinical meaning. Psychological or psychiatric reports and testimony speak in terms of a specific diagnosis, usually from the *Diagnostic and*

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[2]*See* e.g., *Humphrey v. Cody*, 405 U.S. 504, 510 n.6 (1972) (permitting commitment of persons dangerous "because of a mental or physical deficiency, disorder or abnormality").

Statistical Manual of Mental Disorders (American Psychiatric Association 4th ed. 1994) ("the DSM-IV"). When given such content in the context of the evaluation of sexually violent offenders, the term "mental abnormality" has a clear meaning to mental health professionals experienced in this field.

2. The process of determining "mental abnormality" is the same as that used to determine whether someone is "mentally ill."

A qualified mental health professional's determination of "mental illness" for purposes of most states' broad civil commitment laws is a two-step process. First, an individual must be diagnosed by a qualified mental health professional as having a specific disorder defined in the DSM-IV or otherwise generally accepted in the field.[3]

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[3]A mental disorder is a "clinically significant behavioral or psychological syndrome or pattern that occurs in an individual that is associated with present distress (e.g., painful symptoms) or disability (i.e., impairment in one or more important areas of functioning) or with significantly increased risk of suffering death, pain, or disability or important loss of freedom, DSM-IV, at xxi. The DSM-IV specifically excludes as mental disorders:

> deviant behaviors (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society . . . unless the deviance or conflict is a symptom of a dysfunction in the individual . . ..

DSM-IV, at xxii. Mere sexually deviant behavior, thus, does not rise to the level of a mental or sexual disorder.

Second, the professional must determine whether the disorder is of a type and severity that would warrant commitment to a psychiatric hospital. Generally, this involves the professional determining whether the person's mental condition meets the applicable statutory criteria for commitment. Although substantive commitment standards vary from state to state, this process often involves a determination of whether the individual is a danger to himself or others.

The following example clarifies this two-step clinical process: Persons may be civilly committed based upon fears that the patient will harm him or herself. In such a case, the clinician first determines whether the individual suffers from a mental disorder such as a major depressive episode as defined in the DSM-IV 320-327. The clinician then attempts to assess the individual's risk for suicide. This assessment would involve consideration of those factors identified by experts and treatises[4] which are predictive of increased risk for suicide. Common risk factors include advanced age, gender (male), substance abuse and a history of suicide attempts. A major risk factor for suicide is the presence of a personality disorder, DSM-IV 629-674 including antisocial personality disorder, DSM-IV 645-650. Only an individual who both suffers from a specific mental disorder and is determined, through analysis of specific risk factors, to be at high suicide risk would, absent mitigating circumstances, qualify for civil commitment.

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[4]*Clinical Psychiatry for Medical Students* A. Stoudemire (2d ed. 1994); H.I. Kaplan & B.J. Sadock, *Synopsis of Psychiatry: Behavioral Sciences Clinical Psychiatry* (6th ed. 1991).

The interpretation of the legal term "mental abnormality" by experts in the evaluation and treatment of sex offenders follows the same two-step process. First, the clinician determines whether the individual suffers from a mental disorder. The statutory term "mental abnormality," is defined by KSVPA as a "congenital or acquired condition which affects the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others," Kan. Stat. Ann. § 59-29a02(b). This term would be understood by trained mental health professionals to encompass certain severe forms of paraphilia.

Paraphilias are forms of sexual disorder that are defined in the DSM-IV. The disorders are characterized by recurrent, intense, sexually-arousing fantasies, sexual urges, or behaviors generally involving: (1) non-human subjects; (2) the suffering or humiliation of oneself or one's partner; or (3) children or other non-consenting persons. DSM-IV 522-523. For this disorder to be diagnosed, the fantasies, urges and behaviors must occur over a period of at least six months. DSM-IV 522-523. This criterion eliminates occasional, or situational offenders, and ensures the presence of a chronic condition. Specifically excluded from the diagnosis of paraphilia are unusual sexual behaviors due to mental retardation, dementia, personality change due to a general medical condition, substance intoxication, a manic episode, or schizophrenia. DSM-IV 525. Behavior due to these conditions:

> can be distinguished from a paraphilia by the fact that the unusual sexual behavior

> is not the individual's preferred or obligatory pattern, the sexual symptoms occur exclusively during the course of these mental disorders, and the unusual sexual acts tend to be isolated rather than recurrent and usually have a later age of onset.

Id.[5]

Not all deviant behavior can be classified as a paraphilia, nor does all sexual offending have its root in sexual pathology. Further, not all paraphilias constitute mental abnormalities as defined by the KSVPA. At least three specific forms of paraphilia, however, are described by and encompassed within that term's definition. Two, Pedophilia (DSM-IV 302.2) and Sexual Sadism (DSM-IV 302.84), are specifically included within the DSM-IV. The third, Paraphilia Not Otherwise Specified: Rape (Paraphilia NOS: Rape), is not, but is widely recognized by experts in the treatment and

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[5] A leading psychiatrist in the field of sexual pathology has noted that the disorders from which these offenders suffer are characterized by "compulsive, repetitive, driven behavior, which at times has no rational, logical rewards [and] appears to fit the criteria of an emotional or psychological illness." G.G. Abel & J.L. Rouleau, "Male Sex Offenders" in *Handbook of Outpatient Treatment of Adults* 271 (M.E. Thase et al. eds., 1990). While the defining characteristic of the paraphiliac is sexual behavior, many paraphiliacs also suffer from a wide variety of psychological dysfunctions. Paraphiliacs, in addition to demonstrating deviant sexual arousal patterns, often show impairment of social functioning, various cognitive distortions, and, at times, impaired anger control. J.S. Milner & W.D. Murphy, *Assessment of Child Physical and Sexual Abuse Offenders,* 44 Family Relations 478-488 (1995).

assessment of sex offenders to constitute a legitimate diagnostic category.[6]

The second step of the process is to determine whether the disorder is of the type and severity to merit civil commitment as a sexually violent predator. Just as diagnosis of a mental disorder would typically not suffice to justify civil commitment on the basis of "mental illness," the diagnosis of an individual as paraphiliac would not be sufficient to define an individual as a sexual predator. A paraphilia can be characterized as mild, moderate or severe depending on the number of symptoms present and the degree to which those symptoms impair social functioning. *Diagnostic and Statistical Manual of Mental Disorders* 281 (American Psychiatric Association 3rd ed. 1987)("the DSM-III-R"). Because KSVPA pertains only to persons who have already acted out in a criminal, sexual manner and because the evaluator must conclude that the individual's mental condition "predisposes" him or her to commit further such acts, the forensic determination of "mental abnormality" will in practice always involve moderate or, more often, severe forms of paraphilia.[7]

Kansas' law explicitly requires the clinician to make a determination of dangerousness. As with the determination of suicidal risk, there is a well-established empirical literature that allows an expert, appropriately

[6]G.G. Abel & J.L. Rouleau, "The Nature & Extent of Sexual Assault," in *Handbook of Sexual Assault: Issues and Treatment of the Offenders* 18 (W.L. Marshall et al. eds., 1990).

[7]The DSM-III-R defined a paraphilia as severe where "the person has repeatedly acted on the paraphiliac urge." DSM-III-R 281.

trained in the field of sex offender evaluation and treatment, to assess the risk of reoffense.[8] Significant risk factors for reoffenders include: deviant sexual arousal as measured physiologically, prior sexual offenses, the choice of unrelated victims, the choice of male victims, and the choice of strangers as victims. In addition, the diagnosis of a personality disorder, more specifically the diagnosis of an antisocial personality disorder,[9] has been directly related to recidivism.

Sex offender specialists are able to use the term "mental abnormality" to identify a small subset of sex offenders who have specific paraphiliac disorders and who are at highest risk to reoffend. The process for doing so is indistinguishable from the process used by mental health professionals to determine "mental illness" in the ordinary course of civil commitment proceedings. The process involves using well-established and widely accepted diagnostic criteria in addition to clinically and empirically derived risk assessment procedures.

[8]This empirical literature is summarized in R.K. Hanson & M.T. Bussiere, *Predictors of Sexual Offender Recidivism: A Meta-Analysis*, Monograph of the Solicitor General of Canada, Ministry Secretariat (Cat. No. JS4-1/1996-4E 1996). Using statistical techniques that allow the combining of separate studies, the authors were able to combine 61 different data sets from six different countries, thus examining a total of 28,972 sex offenders.

[9]The presence of an antisocial personality disorder in and of itself is not sufficient to meet the criteria for sexual predator laws. The presence of a diagnosis of antisocial personality with paraphilia, though, is well-established as increasing the person's risk of offending and dangerousness.

B. THE DEFINITION OF "MENTAL ABNORMALITY" IS CONSISTENT WITH THE DIAGNOSTIC PROCESS AND NOMENCLATURE OF OTHER PSYCHIATRIC DIAGNOSES.

The Kansas Supreme Court determined that the definitions of "mental abnormality" and "personality disorder" are essentially tautological or circular; that is, "that certain behavior defines the condition which is used to predict the condition." *Hendricks*, 912 P.2d at 138-39. This conclusion reflects confusion regarding the nature of the diagnostic process and diagnostic nomenclature.

Little is known regarding the etiology of the vast majority of mental disorders. Unlike certain medical conditions, such as leukemia, there currently is no biomedical test to determine the presence of a particular psychiatric or psychological disorder. For this reason, diagnostic nomenclature generally requires that diagnoses are made based upon observed behavior and patient self-reporting. From these objective and subjective data, the mental health professional posits the presence a mental disorder. The data are compared to established diagnostic criteria and a specific diagnosis is made.

The process of diagnosing paraphilias and associated personality disorders is no different from the diagnostic process for any psychiatric disorder. The diagnosis of a major depressive episode, for example, is based on the observation or the report from the patient that he or she is experiencing certain symptomatology including such things as insomnia, loss of appetite, feelings of worthlessness, and fatigue (DSM-IV 327).

Because there are no specific laboratory tests that would allow one to make any specific psychiatric diagnosis independent of observable behavior and a person's self-report, all psychiatric diagnoses must be based on a combination of subjective data, objective data, and inference. To charge that such a process is "circular" would basically dismiss all psychiatric diagnoses and would reduce a diagnosis of depression to the following: X acts depressed; X must be suffering from depression, which is why X acts depressed.

Because the definition of mental abnormality is consistent with the diagnostic process and nomenclature of other psychiatric diagnoses, the implications of invalidating the KSVPA on this basis would be profound and far-reaching.

C. SEX OFFENDERS CAN BE TREATED.

To the extent that the Kansas Supreme Court's opinion suggests that no treatment for sex offenders exists, it is misinformed. It is true that sex offenders currently cannot be "cured." No "cures" exist for innumerable recognized medical and psychiatric conditions (e.g., AIDS, diabetes, schizophrenia). There is increasing evidence, though, that state-of-the-art treatment programs developed over the last decade significantly reduce recidivism.[10] In fact, recent

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[10] J.K. Marques, et al., *Effects of Cognitive-Behavioral Treatment on Sex Offender Recidivism*, 21 Criminal Justice and Behavior 28, 28-52 (1994); W.L. Marshall & W.D. Pithers, *A Reconsideration of Treatment Outcome with Sex Offenders*, 21 Criminal Justice and Behavior 10, 10-27 (1994); J.V. Becker & J.A. Hunter, Jr., *Evaluation of Treatment Outcome for Adult Perpetrators of Child Sexual Abuse*, 19 Criminal Justice and Behavior 74 (1992); W.L. Marshall & H.E.

research suggests that treatment might be most effective for high risk offenders.[11] The fact that there is no currently known cure for the disorder or that a condition may be difficult to treat does not make it any less a disorder, nor does it suggest that no treatment methods exist that can control the symptoms and/or complications from these disorders. Indeed, psychiatric hospitals have long been home to many whose conditions are not now curable.

CONCLUSION

While ATSA takes no position concerning the KSVPA or its policy implications, it submits this brief in an effort to assist the Court in understanding certain theoretical and scientific issues involved in this case. Kansas' statute uses terms and definitions which, when applied, have meaning to mental health professionals trained in the treatment and assessment of sex offenders. These terms, used in conjunction with the empirical literature on the subject, allow such experts to identify a small population of very dangerous offenders who suffer

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Barbaree, "Outcome of Comprehensive Cognitive-Behavioral Treatment Programs," in *Handbook of Sexual Assault*, ch. 21 (W.L. Marshall, et al. eds., 1990); W.D. Pithers, "Relapse Prevention with Sexual Aggressors," in *Handbook of Sexual Assault*, ch. 20 (W.L. Marshall et al. eds., 1990) and other authorities cited in these sources. G. Hall "Sex Offender Recidivism Revisited: A Meta-analysis of Recent Treatment Studies," 63 *Journal of Consulting & Clinical Psychology* 802-809 (1995). A. Gordon & T. Nicholaichuk, "Applying the Risk Principle to Sex Offender Treatment," 8(2) *Forum on Corrections Research* 36-38 (1996).

[11] A. Gordon & T. Nicholaichuk, "Applying the Risk Principle to Sex Offender Treatment," 8(2) *Forum on Corrections Research* 36-38 (1996).

from identifiable sexual pathologies and display recognized risk characteristics, and thus, are likely to reoffend.

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

STATE OF KANSAS, Petitioner and Cross Respondent

v.

LEROY HENDRICKS, Respondent and Cross Petitioner

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF OF AMICI CURIAE

Seattle-King County Defender Association, Washington Defender Association, National Legal Aid and Defender Association, Minnesota State Public Defender, and California Attorneys for Criminal Justice, In Support of Respondent Hendricks

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INTEREST OF *AMICUS CURIAE*

The Seattle-King County Defender Association provides public defense representation to persons accused of being "sexually violent predators". The Association represented Andre B. Young at his trial in 1991, in his appeal in *In re Young,* 122 W.2d 1, 857 P.d 989(1993), at his retrial in 1993-1994, and in his Habeas Corpus petition which was granted in *Young v. Weston,* 898 F. Supp. 744 (W.D. Wash., 1995, Ninth Circuit appeal submission withdrawn pending disposition in this case). The Association has represented every person charged under Revised Code of Washington (RCW) 71.09 (the "predator" law) in King County, and currently represents eight clients under that law in state and federal courts. The law is nearly identical to the Kansas law at issue in this case. The Association was founded in 1969 and is the largest public defender office in Washington.

The Washington Defender Association (WDA) is a state-wide non-profit corporation whose approximately 670 members include most of the organized public defender offices in Washington (17 programs are members) as well as assigned counsel. The WDA, with the assistance of grants from the American Bar Association Bar Information Project, developed the Standards for Public Defense Services (1984, 1989). These Standards have been endorsed by the Washington State Bar Association as providing minimum requirements for providing legal representation to poor persons accused of crimes in Washington. The WDA presented a seminar on representation under the "sexually violent predator" law in October, 1995.

The National Legal Aid and Defender Association (NLADA) is a private, non-profit

membership organization based in Washington, D.C. Founded in 1911, the Association is the only national organization devoted solely to assuring the delivery of high quality legal services to poor people. The Association often appears as an amicus party on issues of broad concern that address the constitutional right to counsel and equal access to and fairness in the justice system. Its national membership includes members of the indigent defense and civil legal service bars, and professionals who provide related services. Many of the nation's public defender organizations, as well as assigned counsel and private criminal defense practitioners, are NLADA members.

The California Attorneys for Criminal Justice is the largest organization of criminal defense lawyers in California and regularly appears as amicus curiae in cases important to the administration of justice. California has a statute similar to the one in Kansas.

The Minnesota State Public Defender supervises a state-wide public defense system of more than 500 attorneys. Each year, approximately 240 Minnesota sex offenders complete their sentences. Under the Minnesota Sexually Dangerous Persons Act and Minnesota Sexual Psychopathic Personality Act, each of these persons is in jeopardy of being confined indeterminately, based on crimes for which they have been convicted and sentenced. The constitutionality of post-punishment sex offender commitment laws is of great interest to Minnesota defenders.

The Amici support the position of the Respondent Mr. Hendricks and the decision of the

Kansas Supreme Court. *In the Matter of Hendricks*, 912 P.d 129, 131 (Kan. 1996), cert. granted, 116 S.Ct. 1540 (1996). The parties have consented to participation by amici.

SUMMARY OF ARGUMENT

The Kansas Sexually Violent Predator Act (K.S.A. 59-29a01 *et. seq.*) and its predecessor law in Washington were designed to extend indefinitely the prison terms of sex offenders who otherwise would be released. By reviewing the legislative history in Washington, one can see the punitive purpose underlying these laws. By examining the implementation of the law in Washington, one can discern the punitive impact of these laws.

In response to public outcry, the Legislatures in both states dramatically increased criminal sentences, but such amendments could not retroactively be applied to prisoners who had been given "short" sentences. Because the target prisoners were not mentally ill and therefore could not be civilly committed, both Legislatures created new "civil commitment" systems which do not require proof of mental illness, which are predicated on criminal acts for which the person already has been punished, which commit the person to a prison, and which delay any recognition of the need for treatment until the completion of the criminal sentence.

The statutes permit a second prosecution based on an offense for which the person already has been convicted and served his sentence. They extend incarceration and penalize offenders more harshly than the law permitted at the time they committed their offenses. The laws violate the protections of the Double Jeopardy and Ex Post Facto provisions of the United

States Constitution. In addition, because they are punitive and are applied to people who are not mentally ill, commitment under the law violates the Substantive Due Process protections of the Fifth and Fourteenth Amendments to the U.S. Constitution. *Foucha v. Louisiana*, 504 U.S. 71 (1992).

The Court in granting habeas corpus relief from commitment under the Washington statute in *Young v. Weston, supra*, 898 F. Supp. 744, 749, noted that "the absence of a mental illness requirement is apparent both in the statutory language and in its legislative history".

Recognizing that sex offenders are not classically mentally ill, the Legislature required only proof of a "mental abnormality" or "personality disorder". No recent overt act was required. "Mental abnormality" is circularly defined to predict future crimes based on the commission of past crimes.

The sexual offense is proven again, not in a confidential proceeding as is the case under Washington's civil commitment law (Involuntary Treatment Act (ITA), RCW 71.05) but in a public trial. Committed offenders are called "predators" not "patients", are confined in a prison and may be shot for attempting to escape. The person may be released only if he proves he is "safe to be at large".

The legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character. *Montana Dept. of Revenue v. Kurth Ranch*, 128 L.Ed. d 767, 777 (1994). The question is whether the sanction, disadvantage or penalty imposed constitutes

punishment. *Austin v. United States,* 125 L.Ed.d 488, 498 (1993).

The legislative history of the Washington, California, and Minnesota "predator" statutes, and the six-year-history of incarceration under the Washington law provide overwhelming evidence that the purpose and effect of these statutes, and their companion Kansas statute, are punitive. Each of the states which enacted laws after Washington used similar language in its statute and in the arguments in favor of passing the laws.

As in Kansas (See Respondent's Brief at 15), persons detained under the Washington statute have been denied constitutionally minimal treatment. The actual implementation of the Washington law, in denying constitutional treatment for six years, shows that the law by its nature is not designed to provide treatment but to provide a basis for preventive detention which otherwise would have no legal foundation.

Nearly four years after the first detainees under the "predator" law entered the Washington "Special Commitment Center," U.S. District Court Judge William Dwyer found following a jury trial that the state had denied constitutionally adequate treatment. *Turay v. Weston,* C91-664WD (June 3, 1994). Order and Injunction, Appendix A. Nearly six years after the implementation of the law, April 2, 1996, Judge Dwyer found that "more remains to be done to achieve full compliance." Order on Renewed Motion, Appendix B.

This Court should uphold the decision of the Kansas Supreme Court in finding the Kansas Act

unconstitutional, and should find that the purpose and effect of the Act are punitive, violating Substantive Due Process, Ex Post Facto, and Double Jeopardy protections of the Fifth and Fourteenth Amendments.

ARGUMENT

I. The Legislative History in Washington, Minnesota, and California Makes Clear The Punitive Purpose of the 'Predator' Law Upon Which Kansas' Act Was Modeled and of Similar Laws in Other States

Washington

Kansas modeled its "predator" law upon Washington's RCW 71.09. *Hendricks, supra*, 912 P.d 129, 131. Washington was the first state to enact such a law and has the longest history of its application.

There is little doubt that the primary motive behind the "Community Protection Act of 1990" and the "Sexually Violent Predator" law was to keep sex offenders in prison. As the District Court noted in *Young v. Weston, supra*, there is substantial evidence that the Washington Legislature intended to extend the confinement of persons sentenced under the older, "lenient", determinate sentencing laws, who could not be committed civilly. Id., at 746, fn. 1, and 750, fn. 3.

After public outcry in Washington over several notorious sexual crimes, the Task Force on Community Protection ("Task Force") was formed to recommend changes in the laws related to sexual offenders. [1] Its

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1
The chairperson of the Task Force was King County

"Final Report" was entitled "an act relating to criminal offenders." Final Report of the Task Force on Community Protection, III-1 (hereinafter "Final Report") (Emphasis supplied.) Appendix K. Concern was expressed over a perceived "gap" in the criminal laws that permitted dangerous sex offenders to be released into the community after completing their prison terms. *Young v. Weston*, at 750, fn. 3.

The Task Force called for lengthened sentences for sexual crimes[2] but struggled with the question of how to continue confinement for those who constitutionally were entitled to freedom at the end of their criminal sentences. In the words of David Boerner, Task Force member and chief drafter of the Statute:

> I had no doubt that if the legislature was to extend the length of sentences previously imposed, the courts would find the legislation unconstitutional. While the members of the Task Force could accept that legal judgment, they could not accept the result.

Boerner, Confronting Violence: In the Act and in the Word, 15 U. Puget Sound L. Rev. 535, 549-50 (1992).

Prosecutor Norm Maleng. On the group were two women whose children had been the victims of vicious sexual assaults. Introductory Letter to Governor Booth Gardner, Final Report of the Task Force on Community Protection (1989).

2 The Legislature accepted these recommendations. See RCW 9.94A.310; -.320; and -.360(17).

(Emphasis supplied.) [3]

As outlined by the Task Force, the law was designed to prevent the release of "known dangerous offenders who are highly likely to commit very serious crimes". Final Report, p. II-20 (1989).

The Task Force's proposed "Community Protection Act" called for a new post-sentence, indefinite "civil commitment" law for a class of sex offenders who soon would be released whom the Task Force chose to label "sexually violent predators." The Task Force subtitled its package "an act relating to criminal offenders." Final Report, III-1 (emphasis added). The Legislature quickly enacted the law with only minor modifications. [4] The Act, including what became RCW

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3 This unwillingness to be bound by constitutional restraints was acknowledged by one of the drafters of the statute, Ida Ballasiotes, a member of the Task Force and now a Washington State Representative, who told ABC News that she knew that the Community Protection Act "flies in the face of the Bill of Rights." ABC TV "Turning Point", September 21, 1994.

4 One senator said he proposed a castration amendment because he thought it had a realistic chance of passing, whereas his alternative proposal -- the death penalty -- did not. See comments of Senator Saling, from Excerpts from Hearing of the Senate Law and Justice Committee , January 9, 1990, Appendix C. See also, Scheingold, et al., The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation, 15 U. Puget Sound L. Rev. 809, 816-18 (1992) (describing the mood of public outrage). Professor La

71.09, et seq., went into effect July 1, 1990.[5]

During legislative hearings, Mr. Boerner testified that despite changes "strengthening and toughening, lengthening sentences", there would still be "gaps remaining" that were "unacceptable in terms of protection of the community."

> [U]p to now, under the criminal law['s] generally accepted principles, one can't impose penalties retroactively. People who are in the system now, in prison, being prosecuted now, must have their sentences and the length of those sentences determined by the law that was in existence at the time of their crime. And so we have a number of people who are under the old law who simply can't be charged under the criminal law.

Senate Committee Hearing, January 10, 1990, (transcribed by Defender Association staff) Appendix D, p. 1 (emphasis added).

Fond wrote: "No politician wants to face a sixty-second political attack on television by his campaign opponent claiming 'he voted against community safety and in favor of sexually violent predators.'" Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control, 15 U. Puget Sound L. Rev. at 655, 706).

5 See generally Predators and Politics: A Symposium on Washington's Sexually Violent Predators Statute, 15 U. Puget Sound L. Rev. 507 (1992). This volume collects articles from detailing the political climate and process leading to the passage of the Community Protection Act of 1990.

> The Task Force saw its role as closing this "gap": The Task Force was created principally to answer one question: What gaps in our law and administrative structures allow the release of known dangerous offenders who are highly likely to commit very serious crimes?

Final Report, p. II-20. The Task Force emphasized:

"[W]e must have the means to detain sexually violent predators whose confinement is not insured by our current laws." Final Report, IV-7. Having identified the operative "end point" for "state control," i.e. release from prison under the earlier sentencing law, the Task Force looked for a way to fill the "gap" by extending the state's control. Id., II-20-21.

The Task Force noted that the involuntary treatment law allows indefinite commitment, but is "quite restrictive in its definitions." [6] It wrote:

> Under current laws, sexually violent predators only qualify for civil detention when a mental illness or mental disorder is present. The Task Force examined the histories of some individual violent predators who had been judged not to have a mental illness or mental disorder and

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6 Boerner testified: "[the Task Force] did not begin with the intent to create a civil commitment system that would address the problem." Senate Committee Hearing, January 10, 1990, p. 1. The Task Force's "path to civil commitment of sexually violent predators" is described by Boerner in Confronting Violence, at 547-77.

> therefore were not detainable. The Task Force concluded that existing laws do not offer a sufficient safety net for confinement of sexually violent predators who meet these end points. The Task Force believes a safety net must be created to reduce future acts of violence. The Task Force proposes creating a new civil commitment statute for sexually violent predators.

Final Report, II-21. Boerner elaborated:

> Now [the civil commitment system] was attempted to be applied to [Shriner] and the courts determined that he did not fit the definitions of the existing involuntary commitment law. We don't really challenge that finding based on that legal system. That system was designed to deal with a quite different problem, basically the problem of mental illness, and it's a defined term. Mr. Shriner is not mentally ill as that term is defined. . . .

Senate Law and Justice Committee Hearing, January 10, 1990, p. 1 (emphasis added).[7]

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7 Mr. Shriner was convicted of sexually mutilating a young boy. The boy's mother was appointed to the Task Force. See also Senate testimony: (Boerner: "these individuals are not mentally ill"). This was echoed by other Task Force members, including Maleng, Senate Committee Hearing, January 9, 1990, (contrasting the "classically mentally ill" with the Statute's targets who do not fit the "classic definition of mental illness") and Lucy Berliner, of the Harborview Sexual Assault Center, who testified:

The Law Targets People Who Are Not Mentally Ill

Instead of requiring either a "mental illness" or "mental disorder," the Task Force used the terms "mental abnormality" and "personality disorder." RCW 71.09.020(1). [8] Boerner told the Senate Committee:

> . . . I understand the concern about a definition of what does one mean by mentally abnormal. Now, the personality disorder is a defined term and there is a body behind that. Mental abnormality is not. It's been used before, but the

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> And as everyone has said, it is quite true that sex offenders generally do not suffer from mental illness as we think of it classically like such disorders as schizophrenia, and I think that was precisely for that reason that we proposed an alternative civil commitment process so that we would not be conveying to the community or considering these individuals in the same way.

Senate Committee Hearing, January 10, 1990, p. 9.

8 Justice White warned of the dangers of committing someone for a personality disorder. He said that it would be only a step away from dangerousness courts. He pointed out that the state's rationale, that a person who once committed a crime and now has an antisocial personality that sometimes leads to aggressive conduct can be civilly committed indefinitely, would permit the state to hold indefinitely any insanity acquitee, or for that matter any prisoner who is not mentally ill but who has a personality disorder that may lead to criminal conduct. As Justice White said in language that fits exactly here, "The same would be true of any convicted criminal, even though he has completed his prison term." *Foucha v. Louisiana,* 118 L. Ed d at 450.

> definitions that have been given, provided behind it, simply don't add anything in our judgment. What it means is a condition that is expressed by the prediction, by the fear of what will happen in the future. That's how it was used in the model penal code.... The protections come on the procedural side, not on the definitional side.

State Senator Phil Talmadge queried:

> And frankly, my concern is the use of the term mental or [sic] abnormality is so vague that anybody who's been a sex offender in times past will be deemed to be mentally abnormal and could be pulled up under the net of the bill. I think that's the argument.

Professor Boerner responded:

> That's the argument and I think there's some validity to it. Abnormality is a very broad term.

Senate Committee Hearing, January 10, 1990, p. 7(emphasis added).

The District Court agreed that "mental abnormality" has no clinical meaning and will vary from clinician to clinician. See, *Young v. Weston*, at 750, fn.2.

In its preamble to the statute, the Legislature admitted that the target population was not mentally ill. It said that the target group "do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act..." and that

> in contrast to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities.... RCW 71.09.010. (emphasis added) [9]

The Legislature attempted to circumvent the mental illness prerequisite for civil commitment by creating a new status of "mental abnormality", which is an element of the status of "predator" and is circularly defined as a condition which predisposes a person to commit criminal sexual acts. RCW 71.09.020.

The Statute also permits commitment based on "personality disorder", which covers a broad range of people, including most convicted of a crime, and which this Court has held may not be used to commit someone civilly. *Foucha v. Louisiana, supra*.[10]

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9 It added: "The legislature further finds that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act." RCW 71.09.010.

10 According to the Diagnostic and Statistical Manual IV, "The overall prevalence of Antisocial Personality Disorder in community samples is about 3% in males and about 1% in females. Prevalence estimates within clinical settings have varied from 3% to 30%, depending on the predominant

In a demonstration of the pretense of a mental illness requirement in the statute, the State in *Young* called a psychologist who testified that Mr. Young suffered from "a personality disorder not otherwise specified" and from a "mental abnormality", a "paraphilia not otherwise specified", neither of which alone would support a finding that he is a "predator" but together would allow the psychologist to say that more likely than not Mr. Young would reoffend. *In re Young,* 122 Wn.2d 1, 15-16,71.

The Punishment Imperative of the Law Is Evident in Its Application Only Just Prior to Release From Prison

The Statute authorizes indefinite detention of persons previously charged or convicted of a listed "sexually violent offense," RCW 71.09.020(4), but only just prior to their release from confinement into the community. RCW 71.09.030. Incarceration under this law does not coincidentally follow completion of a criminal sentence. It **may not** occur before the end of the sentence. As Judge Coughenour noted, the statute has a punishment imperative and is inextricably linked to the traditional goals of punishment. *Young v. Weston,* 898 F. Supp. 744, 753. The law first exacts the maximum possible punishment, despite the fact that any mental disorder which causes crime should be known at the time of sentencing.

The statute prohibits detention of "predators" on

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characteristics of the populations being sampled. Even higher prevalence rates are associated with substance abuse treatment settings and prison or forensic settings." DSM IV, at 648.

the grounds of any state mental facility or regional habilitation center. RCW 71.09.060(3).

If a judge determines that there is probable cause to believe that the person is a "sexually violent predator,"[11] the person is taken under warrant (either from prison or the community) to SCC in Monroe, Washington, a maximum-security Department of Social and Health Services facility located within a Department of Corrections (DOC) prison. The person is subjected to an evaluation. RCW 71.09.040, -.050. Over objection, the accused are detained in jail during trial. [12]

RCW 71.09.060(3) permits incarceration in the county

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11 A "sexually violent predator" is: "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." RCW 71.09.020(1).

"Mental abnormality" is defined as: "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the safety and health of others." RCW 71.09.020(2). No definition is provided for the term "personality disorder."

"Predatory" means: "acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization." RCW 71.09.020(3).

12 See ***Lynch v. Baxley,*** 744 F.d 1452 (11th Cir.1984) (use of jails to hold involuntary civil committees violates due process.) The ITA does not authorize jail detention.

jail for up to seven days pending a court hearing. If the State prevails at trial, the person is indefinitely committed to SCC until it is proven that he or she is "safe to be at large." RCW 71.09.060, -090, and -.100.

Under an equal protection analysis, the Washington Supreme Court added a less restrictive alternative requirement to the Statute. *Young,* at 47. The Legislature then amended the law to prohibit consideration of less restrictive alternatives at the probable cause hearing even though such consideration is required under the ITA: "In no event shall the person be released from confinement prior to trial." RCW 71.09.040(4). See, RCW 71.05.240. [13]

The law provides for potentially lifetime incarceration in a maximum security prison for someone who has had one conviction for a sexual offense, at any time, in any state. The law applies only when the accused have completed or nearly completed their entire prison sentence. It is linked to a crime for which the person has been punished. It also may be applied to people found not guilty by insanity who are about to be released because they no longer are insane.

The law creates a new category of sexually violent

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13 A post-*Young* amendment to the release provisions, setting numerous requirements for the committed person to meet, bear out the Legislature's punitive intent. See e.g., RCW 71.09.090-098. These provisions make the possibility of release unlikely. See *Foucha v. Louisiana,* 118 L.Ed.d 437, 470 (1993) (Thomas,J., dissenting) n.10.

predators, a term which conjures up frightening images of animals and suggests a punitive, not a therapeutic approach. By intent and design, the law is punitive.

Minnesota

The legislative history in Minnesota shows that its "predator" law also was intended to extend the criminal incarcerations of convicted sex offenders currently serving criminal sentences which were viewed, in retrospect, as being too short.

The SDP Act was enacted in a Special Session in 1994. Minn.Stat.Ann.Sec.253B, subds. 7a,18b (1996). Following a Minnesota Supreme Court decision overturning a sex offender's commitment, *In re Linehan,*518 N.W. d 609, *pet. for reh. den.*(Minn. 1994), the Attorney General presented a bill to the Legislative Task Force on Sexual Predators. His proposal formed the core of the SDP Act passed by the Legislature. He presented a "three prong approach" to "take every step to assure the public that dangerous sexual psychopaths will not be turned loose on our families, friends and communities." Testimony of Attorney General Hubert Humphrey III Before the Legislative Task Force on Sexual Predators, August 11, 1994 (Appendix E) (hereinafter Attorney General Testimony.)

In proposing a "predator" statute, Mr. Humphrey said: "The question before us today is simple: how do we protect the public from some of the most dangerous criminals in society. " Attorney General Testimony at 1.

> . . .[W]e propose changes in state criminal laws to give prosecutors more tools to keep patterned sex

offenders and pedophiles locked up longer as criminals to avoid the dilemmas inherent in even the tightest civil commitment policy.

Attorney General Testimony at 2.

The Attorney General wanted "a new commitment standard which we think may apply better to the **criminals** we are trying to get at." Id., at 3, emphasis added. An Assistant Attorney General who was a member of the Legislative Task Force testified:

> To put it in kind of stark terms, if you have two criminal sentencing systems and under the first one for a particular crime you're sentenced to two years and under the next one you're committed to twenty years, and after the two years society sees a need to civilly commit you because of the danger that you'll pose....there's a very obvious reason to treat person number one different from person number two.

Statement of John Kirwin, August 11, 1994 Hearing of the Legislative Task Force on Sexual Predators. [14]

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14 The statement was transcribed by a research assistant for Professor Eric Janus at the William Mitchell College of Law. The Act specifies that persons committed as Sexually Dangerous Persons are not to be considered "vulnerable adults" for purposes of the protections of the Vulnerable Adult Act, Minn. Stat. S626.557 (Supp. 1994). Persons committed under this law, unlike all other committed or institutionalized persons, are deprived of the protections of

California

The California "Sexually Violent Predators" law, article 4, Division 6, Part 2, Chapter 2, of the Welfare and Institutions Code (Sections 6600 et sec.),[15] uses the same terms as the Washington and Kansas statutes. [16] Article 4 consists of a "judicial commitment" process in which a state prison inmate, who otherwise would be released on parole, is subject to indefinite incarceration in renewable two-year periods in the Department of Mental Health, housed in a secure, locked facility under the jurisdiction of the Department of Corrections.[17]

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that Act.

15 Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

16 (See RCW 71.09.020(1), and Cal. Welf. & Inst. Code, sec. 6600(a).) "Mental abnormality" in the Washington statute is defined exactly the same as the California definition of "diagnosed mental disorder." (See RCW 71.09.020(2), and Cal. Welf. & Inst. Code, sec. 6600(c).) Both statutes apply retroactively to those who were in custody as of the effective date of the act. Both statutes allow the State to initiate the involuntary commitment process only after a person has served their entire criminal sentence. Neither requires the State to show any new criminal conduct since the person's commitment to prison. (See RCW 71.09.025 and 71.09.030, and Cal. Welf. & Inst. Code, sec. 6600 and 6601(a).)

17 U.S. Magistrate John Moulds found that the lack of adequate care for mentally ill prisoners by the Department of Corrections constitutes cruel and unusual punishment because of deliberate indifference on the part of the Department. The ruling affects about 28,000 mentally ill prisoners. (Analysis

A Los Angeles trial court has found the statute "essentially and predominantly penal in nature and that its retroactive application is barred by" ex post facto prohibitions. *People v. Rasmuson, et.al.,* No. ZM 001798 et.seq., Los Angeles Superior Court, June 12, 1996, at 7, Appendix G. The Court wrote:

> ...it is apparent from the legislative history...that the Legislature intended to enact a measure to reach those whose determinate sentences were nearing completion and whose custodial release the Legislature sought to prevent." *Id.*, at 21.[18]

The court emphasized that any treatment is delayed for many years and then occurs in a penal setting, which is counter-therapeutic, and the law "prioritizes incapacitation over treatment and rehabilitation." *Id.*, at 24-25, citing Wettstein, A Psychiatric Perspective on Washington's Sexually Violent Predator Statute, 15 Univ. of Puget Sound L. Rev. 597, 614-619 (1992).

California's experience was similar to those in Washington, Kansas, and Minnesota. There was a

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prepared for the April 25, 1995 hearing of the Senate Committee on Criminal Procedure, at p. 9.) Appendix F.

18 Another California court upheld the law but required an evidentiary hearing on probable cause. *People v. Hubbart*, Santa Clara Co. No. 140294. The California Supreme Court remanded a petition for review to the Sixth Appellate District. The Second Appellate District has scheduled a hearing on *Rasmuson*.

perceived gap in the laws:

> Under current law there is no legal authority to detain and treat sexually violent offenders who are likely to commit new offenses because of their mental abnormality and defects. There is no procedure to prevent the release into unsuspecting communities of sexually violent offenders who have completed their prison sentences.

SB 1143 Analysis for Senate Committee on Criminal Procedure, April 25, 1995, p.2., Appendix F.[19]

A host of initiatives and statutes sought to increase criminal penalties in general and punishment for sex crimes in particular.[20] (See, e.g., Penal Code sections 667(b) through (i) and 1170.12, the so-called "Three Strikes And You're Out" initiative; Penal Code

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19 Committee reports are authoritative sources for finding legislative intent. *Zuber v. Allen*, 396 U.S. 168 (1969).

20 The California Director of Corrections intervened in a case involving Christopher Hubbart, who was due to be paroled in 1994. "Immediately afterwards, Hubbart was diagnosed as suffering from severe paraphilia, a catch-all term for sexual disorders that are otherwise undefined. Although Hubbart committed no act of misconduct to violate parole, the CDC revoked his parole for psychiatric treatment the day he was due to be released. In 1995, Governor Wilson singled out Hubbart in his State of the State message and urged the Legislature to enact a statute that would keep him and other prisoners from returning to the community." (See Erickson, "Sexually Violent Predators" (1996) Forum magazine, vol. 23, no. 1, p. 127).

section 667.61 et seq., the one and two strikes sex law providing for a lifetime commitment (Stats. 1994, c. 800 (AB 3191)). To address also prisoners entitled to parole, the Legislature passed the "predator" act. Governor Wilson said when signing the law, "Some of the most dangerous criminals will no longer be released simply because the law is so absurdly lenient." Los Angeles Times, October 11, 1995, A-3.

The establishment of a new "civil commitment" scheme was inconsistent with the repeal of the Mentally Disordered Sexual Offender Act in 1981. (Former Welf. & Inst. Code sections 6300 et seq.)

> . . . the Legislature recognizes and declares that the commission of sex offenses is not in itself the product of mental disease. ... persons convicted of a sex offense after the effective date of this section, who are believed to have a serious, substantial, and treatable mental illness, shall be transferred to a state hospital for treatment under the provisions of Section 2684 of the Penal Code." (Emphasis added.) (Historical Note to section 6300, section 4 of Stats 1981, c. 928, p. 3485.)

Further, the Legislature was advised that

> [m]any sexual predators, however, do not have a major mental disorder and are therefore not eligible for the Mentally Disordered Offender Program....they are not appropriate for the civil commitment system...."

Report of Assembly Committee on Public Safety, April 18, 1996, pp.4-5. Appendix H

The delay in treatment stands in stark contrast to the MDO law which specifically requires the Department of Corrections to render treatment while in prison and before MDO proceedings are initiated. (Pen. Code sections 2960, 2962(d)(1).)

Postponement of treatment belies any therapeutic purpose. As the court wrote in *Young v Weston*, *supra*:

> The punishment imperative also undermines the State's purported interest in treating violent sexual predators. ... Of course, it defies reason to suggest that the mental abnormalities or personality disorders causing violent sexual predation surface only at the termination of a prison term. ...The failure of the state to provide treatment prior to the completion of the punishment phase strongly suggests that treatment is of secondary rather than primary concern. " (Id., 898 F.Supp. at 753.)

II. The Failure to Provide Constitutionally Required Treatment to People Committed As 'Predators' Demonstrates the Law's Punitive Intent and Violates Substantive Due Process Protections

In Kansas, the director of the "predator" program admitted that it provided "essentially no treatment". J.A. 393. The failure to meet constitutionally minimal treatment requirements is the inevitable consequence of

a law which did not have treatment as a goal, but used treatment as a jurisdictional pretext. Because Washington has used the "predator" law for four years longer than Kansas, its experience provides a window through which to view the Kansas practice. Both states took a similar approach to the "treatment" facility. They hired staff who were not experienced in treating sex offenders and they located the facility within a prison. JA 400, Resp. Br.15; Washington findings discussed *infra*.

Federal and state courts in Washington have found that the Special Commitment Center denies constitutionally required treatment to its inmates. Because the laws in the two states share the same design and purpose, it is logical that Kansas will continue to deny constitutional treatment as Washington has.

> There is a
> . . .constitutional right to receive such individual treatment as will give [an involuntarily committed person] a realistic opportunity to be cured or to improve his or her mental condition. [Citations omitted] Adequate and effective treatment is constitutionally required because, absent treatment, the hospital is transformed 'into a penitentiary where one could be held indefinitely'. . .

Wyatt v Stickney (M.D Ala 1971) 325 F.Supp. 781, 784, affd. sub nom *Wyatt v Anderholt* ,503 F.d 1305(5th Cir. 1974) (emphasis added).

U.S. Court Finds Treatment Inadequate

In an "Order and Injunction", the U.S. District

Court found that the Washington SCC treatment staff was not experienced or adequately trained; that treatment plans with objective measures of progress had not been developed; that clinical direction was absent; that the trust necessary to establish therapeutic relationships was missing; that treatment staff had verbally abused and strip searched residents; and that the program had failed "to meet constitutional standards to date." Order and Injunction, Appendix A. [21]

The Court issued its First Supplemental Order in August, 1994, denying the state's request for a 180 day extension to conduct a nationwide survey to determine prevailing professional standards. It noted: "The SCC program has been in operation for four years. Defendants [state] should already know prevailing professional standards." Appendix I, at 3.

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21 The Statute fails to provide transitional programs such as work release. Recent amendments purport to allow conditional release but saddle detainees with the burden of establishing a mechanism for release. RCW 71.09.090-098. Dr. Vernon L. Quinsey, who was commissioned by SCC to critique its program, cited the lack of "any provision for aftercare and community supervision" as "fatal" to any realistic hope for successful therapy. LaFond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. Puget Sound L. Rev. at 655, 706. In addition, the Legislature has created a crime of escape for a person released under the Statute to a less restrictive alternative who leaves the state without permission. RCW 9A.76.120. Leaving the state without permission while under a less restrictive alternative under the ITA, RCW 71.05, is not defined as a criminal act.

SCC Conditions SCC More Severe Than those in Prison

A King County, Washington, trial court found that the conditions of confinement under RCW 71.09 and the lack of constitutionally adequate treatment violated substantive due process, but declined to dismiss the petition.[22] Appendix J. A civil commitment scheme violates substantive due process if it imposes a regimen which essentially is identical to that imposed upon felons with no need for psychiatric care. *Allen v. Illinois,* 478 U.S. 364, 373 (1986). In many respects, the conditions at SCC are more severe than those imposed upon incarcerated criminals and than those imposed upon the same detainees when they were in prison under their criminal sentences. See FFA-5, 11, 13, 14, 16, 27, 28; Appendix J, p. 5.

The level of security for those detained under the Statute is high. FFA-2, 3, 4, 5, 6, 7, 11, 12, 14, and 16. SCC is located within a DOC institution. Residents may be shot for attempting to escape. FFA-6. Medical, food, library and visitation services are provided by DOC. FFA-2, 3. DOC guards provide external security and some internal security. FFA-3. When residents leave SCC they are transported in full prison gear including jumpsuits and shackles. FFA-11. They may be strip searched without reasonable suspicion any time they leave the facility, even though under constant armed surveillance while gone. FFA-11. Electronic

[22] The Findings of Fact and Conclusions of Law and Order issued by Judge Armstrong on 11/7/94 in *In re Campbell*, No. 93-2-15348-1, are attached as Appendix J and referred to hereinafter as "FFA."

audio and visual monitors are in place throughout the facility. FFA-4. The program director had no training or experience in sex offender treatment before being hired by SCC. FFA-23. There are more treatment opportunities for convicted sex offenders in prison than at SCC. FFA-27.

Residents have been verbally abused and subjected to racial epithets. FFA-29. Expert testimony characterized the inconsistent application of rules and policies as cruel. FFA-13. The lack of reasonable opportunity to improve one's "condition" and be released from civil commitment is also cruel.[23]

In *Reno v. Flores*, 123 L. Ed. d 1, 16-17 (1993), this Court analyzed a substantive due process challenge to a regulation concerning the custodial detention of juveniles. Finding no due process violation, the court said: the government did not intend to punish, the conditions were decent and humane, and the detention was not punitive because it was not excessive in relation to the governmental interest. Id., at 17. The "predator" law does intend to punish, the conditions at SCC are not decent and humane, and the detention is excessive and punitive.

Unlike in *Allen v. Illinois, supra,* in which offenders may be released "after the briefest time in

[23] Confinement for mental illness is cruel and unusual punishment unless accompanied by adequate treatment. Ohlinger v. Watson 652 F. d 775, 778, n.6.(9th Cir. 1981).

confinement", release under the "predator" statutes is not likely because treatment has been unavailable. The Legislature presumed that persons committed were "unamenable" to treatment and would require "very long term" treatment. RCW 71.09.010.

This Court wrote in *Nixon v. Administrator of General Services,* 433 U.S. 425,476 n.40 (1977):

> [P]unishment is not restricted purely to retribution for past events, but may include inflicting deprivations on some blameworthy or tainted individual in order to prevent his future misconduct.

Deprivation of liberty in a maximum security setting in which constitutionally adequate treatment has been denied is punishment. A statutory scheme which legitimizes community condemnation by labeling committees "sexually violent predators," which seeks to obtain the commitment through open court hearings and open court files, and which presumes a lengthy loss of liberty is inconsistent with a real treatment rationale. It is punitive in design, intent, purpose and effect.

"It is the effect, not the form, of the law that determines whether it is ex post facto." *Weaver v. Graham,* 450 U.S. at 31. (Emphasis supplied.) The overall design and effect of the statute must bear out the non-punitive intent. *United States v. Ward,* 448 U.S. 242,248-249 (1980). The intent, design and effect of the Statute prove it to be penal.

CONCLUSION

This law may have been well-intentioned as an

effort to respond to public fear. But it was designed to do something which the Constitution does not permit--extend prison sentences after the fact, and detain people under the guise of civil commitment who are not mentally ill. In the process, it also punishes people twice for the same offense. Professor La Fond wrote: " ...In America, we punish a citizen for what he has done and not for what we think he may do." La Fond, supra, at pp. 702-703.

The Kansas Supreme Court was correct in its ruling and we urge the Court to affirm.

Respectfully submitted,

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